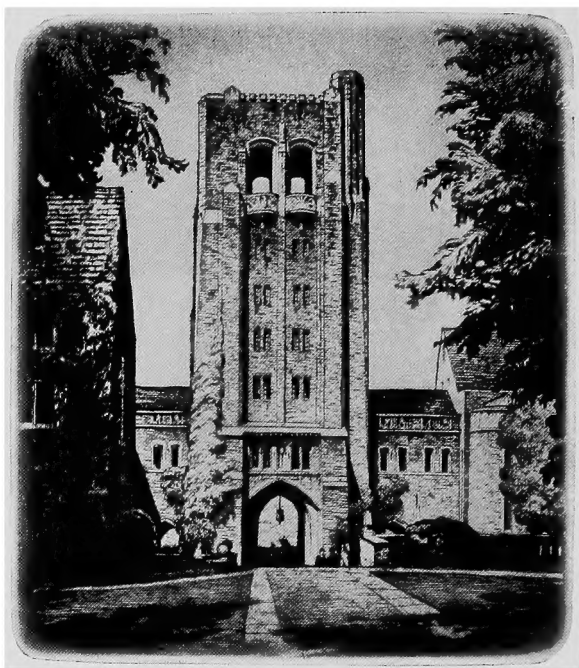


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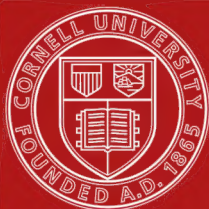
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THE
LAW OF CARRIERS

OF

GOODS AND PASSENGERS,

PRIVATE AND PUBLIC, INLAND AND FOREIGN, BY
RAILWAY, STEAMBOAT, AND OTHER MODES
OF TRANSPORTATION; .

ALSO, THE

CONSTRUCTION, RESPONSIBILITY, AND DUTY OF

TELEGRAPH COMPANIES,

THE RESPONSIBILITY AND DUTY OF

INNKEEPERS,

AND THE

LAW OF BAILMENTS

OF EVERY CLASS, EMBRACING REMEDIES.

BY
ISAAC F. ^{letcher} REDFIELD, LL.D.



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TO THE

HONORABLE THERON METCALF, LL. D.,

LATELY ONE OF THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,

The model reporter, the learned, able, and pure-minded judge, the unexceptionable law writer, the accomplished scholar, the good citizen, the faithful friend, the earnest and devout and courteous Christian gentleman, this imperfect effort of his life-long admirer is inscribed, without seeking permission; knowing that his forbearing judgment cannot but look with some allowance upon so innocent an effort of the author to perpetuate his own remembrance among the profession, by associating his name, on the same page, with that of one of the greatest masters of the learning of the English Common Law which the American Bar has ever produced, by his obliged and grateful friend,

ISAAC FLETCHER REDFIELD.

BOSTON, April 10, 1869.

PREFACE.

THIS volume, as the title page will naturally indicate, was not expected, originally, to extend beyond the first two topics embraced — carriers and telegraphs. It was found convenient to embrace innkeepers in the same volume, because of the analogy of the rule of responsibility. Having then so nearly exhausted the subject of bailments, it seemed desirable to have the book embrace the entire topic; both for the convenience of the profession as well as students, and equally out of regard to the completeness of the work.

So much has been already said, in the introductory chapters to the several parts of the work, in regard to the design and objects of the author in the work, that little more need be added here. The author will only say, that he feels every assurance that the work will be found extremely useful, both to the profession and business men in the departments of law discussed, as well as to students. He should certainly not venture to hope so much from the reception of this book among the profession, if he had not already experienced so much kindness from them, both at home and abroad, in regard to his other efforts to serve them in the same way. And unless he is in some way led into misapprehension in regard to the readableness and

utility of this work, it will be found an agreeable and valuable text-book, as well as reliable digest of the leading cases, upon all the topics discussed. And, if so, he will feel amply rewarded for the large amount of labor bestowed upon it.

I. F. R.

Boston, *July* 1, 1869.

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- § 332. How far common carriers of goods or passengers may recover *pro rata itinerum*.
- § 333. The shipper, whether the owner of the goods or not, is always primarily liable to the carrier for freight, and the latter is not obliged to refuse to deliver goods until the freight is paid, unless he so stipulate.
- § 334. If the carrier deliver the goods to the consignee without exacting freight, trusting to the consignor, he cannot afterward assert any such claim on the bankruptcy of the consignor.
- § 335. How far carriers of passengers by water are liable to actions for not furnishing satisfactory subsistence.
- § 336. The captain in such cases cannot justify excluding a passenger from the salon table, unless he conducts disorderly, so as to disturb the quiet and comfort of others, at table.

- § 337. How far carriers are responsible for goods damaged or lost by being stowed upon deck.
- § 338. The carrier is bound to know or learn the laws and regulations of the port of destination, and conform thereto; and if he fail to do so, is responsible for the consequences.
- § 339. How far passenger carriers by water, will be excused for refusing to carry obnoxious persons to places where their presence might probably excite riot; or in sending them back to the place of departure, from considerations of prudence and humanity.

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- § 340. Are responsible for the utmost care and watchfulness.
- § 341. Duty extends to everything connected with the transportation.
- § 342. But will not extend to an insurance of safety.
- § 343. Will make no difference, if passenger does not pay fare.
- § 344. So too where the train is hired for an excursion, or is under control of state officers.
- § 345. Not easy to define the degree of care required.
- § 346. Passenger carriers not responsible for accidents without fault.
- § 347. They contract only for their own acts.
- § 348. They must adopt every precaution in known use.
- §§ 349, 350, and notes. Further discussion of the rule and the cases.
- § 351. Duty to inform passengers of peril requiring caution to escape.
- § 352. Person purchasing a ticket becomes a passenger, and is entitled to protection on reaching his seat in the carriages.
- § 353. Passenger carriers bound to exclude disorderly persons from their carriages.
- § 354. Company bound to fence its stations so as to hinder passengers entering by a dangerous way.
- § 355. A passenger carrier who attempts to carry ordinary passengers and soldiers at the same time, is responsible for the consequences.

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- § 356. Company not liable unless in fault.
- § 357. Not liable where plaintiff's fault contributes directly to injury.
- § 358. Company liable for willful misconduct, or such as plaintiff could not avoid.
- § 359. Plaintiff may recover for gross neglect of company, although in fault himself.

- § 360. But not where he knew his neglect would expose him to injury.
- § 361. May recover although riding in baggage car.
- § 362. Company do not owe such duty to wrong doers.
- § 363. May recover although out of his place on the train.
- § 364. Plaintiff affected by negligence of those who carry him.
- § 365. Fault on one part will not excuse the other, if he can avoid committing the injury.
- § 366. Negligence to be determined by the jury, where evidence conflicts.
- § 367. Plaintiff must be lawfully in the place where injured.
- § 368. Passengers bound to conform to regulations of company, and directions of conductors.
- § 369. Precautions to be used by passengers.
- § 370. Proof of negligence on plaintiff.
- § 371. After proof of presumptive negligence, company must show that no reasonable precaution could escape it.
- § 372. One crossing a railway track must look out for trains, or he cannot recover.
- § 373. Rushing across a track when a train is approaching is foolhardy presumption.
- § 374. One cannot recover for an injury the result of heedlessness.
- § 375. The degree of precaution required of passenger-carriers.
- § 376. English courts recognize no difference between negligence and gross negligence.
- § 377. Negligence to preclude recovery must directly tend to produce the injury.
- § 378. Ordinarily proof must be given of defendants' negligence, and that but for such negligence the injury would not have occurred.
- § 379. Passenger carriers must provide suitable accommodations for all passengers.
- § 380. Then passengers must conform to the usages and rules of the company or fail to recover.
- § 381. Where passenger is injured by the fault of carrier's employees he may recover, but not if done by his own invitation.

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- § 382. Passengers may recover, if they have reasonable cause to leap from the carriage, and sustain injury.
- § 383. But not where their own misconduct exposes them to peril.
- § 384. But may recover, if injured in attempting to escape danger.
- § 385. Cannot excuse leaping from cars because train passes station.
- § 386. Must resort to their action for redress.
- § 387. Rule of law, where train passes station.
- § 388. Rules where a person enters the cars to see another seated.
- § 389. Company bound to stop their train a sufficient time.
- § 390. No recovery can be had where passenger leaves the cars on the wrong side.

- § 391. Recent decision in England.
- § 392. Dissenting opinion approved.
- § 393. The case affirmed in the Exchequer Chamber.
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- § 395. Redress, in such cases, given exclusively by statute.
- § 396. Form and extent of the remedy under the English statute.
- § 397. Where the party is in fault, no recovery can be had.
- § 398. By English courts no damages allowed for mental suffering.
- § 399. In Pennsylvania, damages measured by probable accumulations.
- § 400. In Massachusetts, company subjected to fine not exceeding \$5,000.
- § 401. Wife cannot maintain the action for death of husband, or father for death of child.
- § 402. In Illinois, the personal representative sues for the benefit of the widow and next of kin. Rule of damages.
- § 403. Form of the indictment.
- § 404. If those having charge of passengers, not *sui juris*, leave them exposed, company not liable.
- § 405. No action lies if death caused by neglect of fellow-servant or by machinery.
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- § 408. Parents may recover for death of child of full age.

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- § 409. In a suit by husband for injury to the wife he may recover the expenses of the cure.
- § 410. But such expenses cannot be recovered in a suit on behalf of the wife for her personal injuries.

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- § 411. Company liable to deliver passenger according to contract.
- § 412. May excuse themselves by special notice.
- § 413. Liable for damages caused by discontinuance of train.
- § 414. Carriers not performing according to previous notice liable to all injured as for breach of duty.
- § 415. Not liable for injury caused by stage company, connecting with railway.
- § 416. Company excused, by giving proper notice of the course of their trains and the places of changing cars.
- § 417. Rule of evidence and of estimating damages in such cases.
- § 418. In order to recover special damages in such case it must appear clearly that they occurred and were inevitable.

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- § 419. Company not bound to carry where carriages full.
- § 420. But must carry according to terms which they advertise.
- § 421. Not bound to carry disorderly passengers, or those otherwise offensive.
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- § 423. Purchase of ticket does not constitute a contract.
- § 424. Company has a right to impose reasonable regulations as to carriage of passengers.

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- § 425. All damage, present and prospective, is recoverable.
- § 426. But these should be obvious, and not merely conjectural.
- § 427. New trials allowed for excessive damages.
- § 428. But this only allowed in extreme cases.
- § 429. Counsel fees not to be considered.
- § 430. Some English judges doubt if damages should be claimed as compensation for pain.
- § 431. Not so viewed generally.
- § 432. Plaintiff may show value of his time lost.
- § 433. Generally rests very much in discretion of jury.
- § 434. In actions for loss of service, cannot include mental anguish.
- § 435. Woman claiming damages for personal injury cannot prove state of her family or death of husband.
- § 436. Refusal of court to set aside verdict for excessive damages.
- § 437. The right to damages question of law; the amount, one of fact.
- § 438. Chief Baron *Pollock's* commentary on these questions.
- § 439. Special damages cannot be recovered unless alleged and proved.
- § 440. Plaintiff who claims damages for loss of time and business may prove nature of business and probable profits.
- § 441. Mother recovers pecuniary loss, by death of infant child during minority, but nothing for shock to feelings.

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- § 443. Not the same as where goods and baggage are ticketed through.
- § 444. It is to be regarded as a distinct sale of separate tickets for different roads.
They may be used when the holder elects.

- § 445. The first company are to be regarded as agents for the others.
- § 446. If the business of the entire line is consolidated, it is different.
- § 447. But in general it is not regarded as a case of partnership.
- § 448. The companies being in different States and kingdoms makes no difference.
- § 449. First company held liable for baggage not checked.
- § 450. So for an injury, occurring on another line, over which they had sold tickets.
- § 451. A stage route intersected by a ferry, hired to carry the coaches over, is responsible for the safety of passengers on the ferry.

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- § 452. Are competent to show state of health in connection with other facts.
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- § 454. Exposition of the just application of the rule admitting declarations as part of the *res gestæ*.

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- § 455. Company not held liable for exemplary damages unless they ratified the expulsion.
- § 456. But upon principle the company should be liable for special damage.
- § 457. Are trespassers if they refuse to deliver baggage in such cases.
- § 458. Company must keep strictly to the terms of any by-law regarding the production of tickets when called for.
- § 459. Conductors bound to exclude disorderly or offensive persons.
- § 460. One wrongfully expelled from the cars, not entitled to special damages, unless it occurs clearly without his fault.
- § 461. Where ticket lost person liable to pay fare.
- § 462. One wrongfully put on shore, by a passenger boat, short of his destination, may show, to enhance damages, that it was done in an insulting manner.

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- § 463. Payment into court in general count and tort, only admits damages to extent of sum paid.
- § 464. But in cases of special contract, admits the contract and breach alleged.

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- § 465. Statement of the facts of a case.
- § 466. Company not liable to occasional passengers on freight trains for torts committed by employees of other roads.

- § 467. Same liability toward passengers coming from other roads as in other cases.
- § 468. And owe passengers same duty upon other roads as their own.
- § 469. Railway responsible, on other roads, to same extent as the owners.
- § 470. Responsibility measured by law applicable to case.

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- § 471. Corporations are only liable according to *lex loci*.
- § 472. This in conformity with the general law.
- § 473. Corporations must be judged by local law.
- § 474. It was left to the jury to say what was reasonable as to the time of shipping goods under a special contract from a foreign country.
- § 475. But in the absence of special contract the laws of the country to which the ship belongs will govern.
- § 476. Where a collision occurred in a British port, the rights of parties will be settled by the law of that country.

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- § 477. May control conduct of passengers.
- § 478. Must be reasonable and not against law.
- § 479. Power may be implied, where not express.
- § 480. Not required to be in any particular form unless by special provision.
- § 481. English railways have power to enforce by-laws by penalty and imprisonment.
- § 482. Model code of by-laws framed by Board of Trade in England.
- § 483. Company may demand higher fare if paid in cars.
- § 484. Public statutes control by-laws.
- § 485. Cannot impose penalty.
- § 486. Cannot refuse to be responsible for baggage.
- § 487. Statutes operate upon members from promulgation and upon others from time of knowledge of the same.
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- § 493. In civil suit must prove violation of rules.
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- § 495. Through trains will not be required, unless reasonably necessary for public accommodation.
- § 496. Mode of enforcing search-warrants in freight stations.
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- § 498. By-laws as statutes.
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- § 511. The right of the company to require colored passengers to occupy particular seats.

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- § 512. Company bound to keep road safe. Act of other companies no excuse.
- § 513. Some cases hold that passengers can only sue the company carrying them.
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- § 514. Passenger-carriers bound to make landing-places safe.
- § 515. But those who ride upon freight-trains, by favor, can only require such security as is usual upon such trains.
- § 516. Owners of all property bound to keep it in state not to expose others to injury.
- § 517. This rule extends to railways, where persons are rightfully upon them.
n. 3. Cases, as to the necessity of privity of contract existing, reviewed.
- § 518. One who keeps open public works is bound to keep them safe for use.
- § 519. Corporations presumptively responsible to the same extent as natural persons in the same situation.

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- § 521. Distinction further defined.
- § 522. Negligence of plaintiff.
- § 523. Damages.

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- § 524. The care and diligence of passenger-carriers by railway to be in proportion to its extreme danger.
- § 525. Where a train is moved in an unusual manner through a populous city, or where it is pushed backwards, there should be a person constantly on the look-out.
- § 526. The party whose negligence produced the injury is responsible, if he by proper watchfulness might have avoided it, notwithstanding some remote negligence of the other party.
- § 527. And the fact that the party injured was a trespasser at the time, will not necessarily preclude a recovery.
- § 528. But if the party's own fault directly leads to the injury, without which it would not have occurred, he cannot recover.
- § 529. Sufferings in feeling of the party injured must be taken into account in estimating damages to him for the injury. But the feelings of other parties, incidentally affected thereby, are not to be considered in estimating the loss to them.
- § 530. Damages may be given on account of the death of a child, for his recovery and the comfort of his society after he shall have come of age ; but not for the expenses of the funeral.

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- § 531. Where a passenger is injured on a railway, the *primâ facie* presumption is, that it resulted from the want of due care on the part of the company.
- § 532. But, nevertheless, it is competent to prove the damage occurred without their fault.
- § 533. One who rides upon a free pass, or in the baggage-car, is not thereby deprived of his remedy against the company for injuries received through their want of due care, provided he was at the time a passenger and without fault on his own part.

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- § 534. The distinction between the responsibility of common carriers, and passenger carriers, rather formal than substantial.
- § 535. Passenger carriers bound to furnish themselves with every security known to the business, or else the risk caused by any deficiency rests upon them.
- § 536. People in foreign countries cannot comprehend our rashness in passenger transportation by railway.
- § 537. Comparison of the precautions abroad with those used here. The courts should be more stringent in their demands upon this subject.

- § 538. Those who voluntarily submit to destruction, as well as those who perpetrate it, should not go unpunished.
- § 539. The instinctive sentiments of juries in holding railway passenger carriers responsible for all injury to passengers, wise and just.
- § 540. It is not safe to affirm, that passenger carriers are absolutely bound to safe delivery, at the point of destination. But the rule of law, properly understood and justly applied, falls scarcely short of this.

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- § 541. The ordinary corporate rights and duties of these companies discussed elsewhere.
- § 542. The chief inquiry, as to third parties, is, which shall assume the risk of transmitting a message.
- § 543. Telegraphic communications must be proved by production of the original, or in default of that, by copy, etc.
- § 544. Questions will arise whether the message delivered to the operator, or that received, is the original.
- § 545. If the party sending the message is the actor, that received at the end of the line is the original.
- § 546. But a mere reply, or message sent on behalf of the person to whom sent, is the original, when delivered to the operator.
- n. 4. Discussion of these points in a case in Vermont.
- § 547. Where both parties agree to communicate by telegraph, each assumes the risk of his own message.
- n. 5 and 6. Discussion of the question of making contracts by telegraphic communication.
- § 548. Illustration of the question of resemblance or difference between correspondence by mail and by telegraph.
- § 549. If one employ a special operator, he assumes the risk of transmission. It is his own act by his agent.
- § 550. Both parties may be entitled to maintain actions for default in transmitting messages.
- § 551. Notice that company will not be responsible for mistakes in unrepeatd messages binding.
- § 552. The American courts adopt the same view. Company always responsible for ordinary neglect.
- § 553. Companies can only be regarded as insurers of the accuracy of repeated messages.
- § 554. Held responsible in one case where specially cautioned.

- § 555. But, generally, not responsible for errors in unreported messages, except on proof of negligence or want of skill.
- § 556. Telegraph companies not responsible as common carriers, and may limit responsibility to their own lines and to repeated messages, if not guilty of negligence.
- n. 10. Discussion of the question, how far telegraph companies are common carriers.
- § 557. Case in Kentucky, holding the company responsible only for care and skill in unreported messages.
- § 558, and n. 16. Discussion of the question of responsibility for messages passing over different lines.
- § 559. Statement of some suggested difficulties in establishing a proper rule of damages in such cases.
- § 560. All that is required to render the business safe is to understand the messages correctly.
- § 561. The ordinary rule of damages applicable to contracts should be applied here.
- § 562. The fact that such correspondence is not fully understood by the companies will make no essential difference in the application of the rule.
- § 563, and n. 21. Party on discovering mistake must elect whether to adopt it or not.
- § 564. Rules of damages adopted in some unreported cases.
- § 565, and n. 23. The party entitled to recover penalty is the contracting party.
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- § 567. Several miscellaneous points decided by the cases.
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 2. And telegraph companies, having legislative powers, must see that their works do not obstruct the highway, to the injury of ordinary travellers.
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 4. The duty of secrecy in regard to telegraphic correspondence important and difficult to secure.
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 6. Telegraph posts, once legally established in the highway, cannot afterwards be removed or treated as a public nuisance.
 7. Atmospheric influences, or unintelligible nature of message, how affecting damages.
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- § 568. An elaborate review of numerous points of law upon the subject.
- § 569. Powers of courts of equity in vindicating the exclusive rights of such companies.
- § 570. Duty of companies to transmit messages promptly and fairly.
- § 571. Numerous points decided in another case.

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- § 573. Exposition of the terms "under" and "across."
- § 574. Erecting posts in highway without legislative authority a nuisance, even if sufficient space remain for the passage of travel.
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- § 575. The definition of a common inn or house of public entertainment.
- § 576. It is not requisite that stables be connected with the house. Or that travellers exclusively receive entertainment there.
- § 577. It will not vary the character of the relation that one remains ever so long, or that the terms of compensation are fixed by previous contract.
- § 578. The same points further illustrated.
- § 579. But a mere boarding-house keeper cannot be subjected to the responsibilities of an innkeeper.
- § 580. So if a guest take a room at an inn, for the purpose of selling goods therein, the landlord is presumptively not responsible for their safety.
- § 581. Inns and taverns seem now to be much the same.
- § 582. Inns, where spirits were furnished, have in this country, been generally under statutory regulation.
- § 583. The extent of statutory regulations upon the subject.
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- § 585. A guest must become the patron of an inn or public house.
- § 586. The particulars which must concur in order to constitute one a guest.

- § 587. One may acquire the rights of a guest, as to his horse, by leaving him at the stable of an inn.
- § 588. So too where, in addition to that, the guest took some of his meals at the inn.
- § 589. The American cases seem to take the same view.
- § 590. Further discussion of what constitutes the relation of guest and landlord.
- § 591. Restaurant-keeper not responsible as innkeeper. But one who occasionally entertains travellers may be an innkeeper.
- § 592. But one is clearly not responsible, as such, to one not a guest.
- § 593. The innkeeper is responsible for injury to a horse left at his stable, while driven for exercise.
- § 594. One wishing to become a guest at an inn, and ready and willing to pay for his entertainment, may recover damages for refusal to receive him.

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THE EXTENT OF THE INNKEEPER'S RESPONSIBILITY.

- § 595. He is responsible presumptively for all losses, and can excuse himself only by showing that he did all in his power to prevent it.
- § 596. Many of the recent cases state the responsibility of innkeepers to be the same as that of common carriers. It comes so near that in truth that the difference is of little practical importance.
- § 597. Still there is in strictness no responsibility, unless the innkeeper, or the inmates of his house, are some way in fault.
- § 598. He is responsible for all the money and other articles the guest finds it convenient to carry with reference to his expenses and his business. And if money is stolen from the guest he may recover, although he omitted to put it in the safe.
- n. 7. But this will depend somewhat upon the amount and the use.
- § 599. The same subject further discussed. The obligation upon the guest to place his money in the safe seems to depend upon the amount and what is prudent.
- § 600. The guest must deposit his goods in the ordinary place, in care of the proper person.
- § 601. There is no particular course to be adopted by the guest except to be prudent. It is the duty of the host to be watchful at all points.
- n. 14. He must not trust to the opinion of his guest; but see to it himself that the goods are positively kept safe, as far as in his power. The omission of the guest to fasten his door, etc., will not excuse indifference on the part of the host. Where the guest exposes his money to be seen by others and then leaves it within their reach, he has no redress if it is stolen.
- § 602. The guest must either take exclusive possession of his goods, or else utterly disregard all ordinary precautions for safety, in order to exonerate the innkeeper.
- § 603. To charge the guest with negligence, exonerating the innkeeper, it should appear the guest fully understood the danger and persisted in leaving his goods exposed.

- § 604. Some of the cases seem to limit the innkeeper's responsibility to wearing apparel and articles necessary for present personal use.
- § 605. The true rule seems to be, that the innkeeper is responsible for all money and other property the guest finds it convenient to have with him, he using all reasonable precautions himself not needlessly to expose it to loss.

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AND EFFECTS OF THE GUEST IN HIS CUSTODY.

- § 606. The innkeeper has a lien upon all the goods of the guest for all expenses incurred.
- § 607. And this lien will not be affected by any defect of title in the guest.
- § 608. But a stable-keeper, even in connection with an inn, who receives a horse at livery, has no lien for his keep or for any expense incurred by the owner. An agister of horses has no lien upon them for expense incurred, and is not responsible except for want of ordinary care. The innkeeper has no lien upon the effects of his ordinary boarders for their expenses incurred.
- § 609. The innkeeper has a lien upon the traveller's horse put in his stable, although he lodge elsewhere. So also upon all property the guest leaves in his possession, for all expense incurred.
- § 610. Distinction stated between the case of an innkeeper and livery-stable keeper as to lien.
- § 611. It will make no difference that the guest is an infant.

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- § 612. The action may be brought in the name of the person making the contract, or of him on whose behalf the contract is made.
- § 613. It may be either in assumpsit, on the contract, or in case upon the duty in law, implied from the relation.
- § 614. The extent and character of the evidence required either in support or defense of the action.

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- § 615. The scope of the work, and the reasons for rendering it a complete treatise upon the law of bailments.

- § 616. Reasons for confining the treatise to the limits of the common law.
- § 617. Definitions connected with the subject.
- § 618. Gratuitous bailments rest on personal confidence.
- § 619. Definition expanded.
- § 620. Same continued.
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- § 622. Definition of deposit, mandate, and loan, the three species of bailment, without reward.
- § 623. Consideration of the degree of responsibility of such bailees; only bound to good faith and fair dealing.
- § 624. In the case of deposits and mandates the bailee must do as he would in his own business of equal importance.
- § 625. But it is held that in the loan of things for gratuitous use, the bailee is bound to extraordinary diligence, and responsible for slight neglect.

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- § 626. The rule of responsibility here, to act in good faith, as the bailee conducts his own affairs.
- § 627. The rule of responsibility, as stated by Mr. Justice *Blackstone*, much the same.
- § 628. Special undertakings by the bailee, binding to the extent understandingly made.
 - n. 4. Summary of cases on the responsibility of depositaries.
- § 629, and n. 7. Further exposition of the rule. Degree of diligence depends on circumstances; not responsible for theft or robbery without his fault.
- § 630. If bailee put the goods to a use not justified by the bailment he is guilty of a conversion and responsible for all losses.
- § 631. In cases of joint deposit, where there is a special undertaking to keep and restore to all jointly, the bailee cannot deliver to one. The remedy.
- § 632. How far is the depositary responsible for the fraudulent or felonious act of servants? It would seem the master should be responsible for the theft of his servant in the course of his employment.
- § 633. Cases in different States defining responsibility of depositary.
- § 634. Depositary not liable to an action for not restoring the thing, until after demand, unless he have put it to some use not justified by bailment.
- § 635. If the receiver of goods has an option to return the same or other goods of the same kind, the title passes to him.
- § 636. Mere deposits are countermandable or determinable at the option of both parties.

CHAPTER IV.

MANDATES.

- § 637. A voluntary undertaking not obligatory; but if entered upon must be faithfully performed, according to the expectation created.

- § 638. One without reward or profession of skill, only bound to act according to his ability. The point illustrated by Lord *Loughborough*, Ch. J. Common Pleas.
- § 639. One may, by special undertaking, or by intermeddling with goods, make himself responsible for all losses.
- § 640. A mandatary may use the thing in a reasonable manner, by himself or his servants; but if he possess skill he is bound to use the same as a hirer, who undertakes to use skill.
- § 641. A mandatary, who does not stipulate for compensation, must be understood to act without, unless the circumstances indicate the contrary.
- § 642. The promise of a bailee to return the goods does not increase his responsibility.
- Notes 1, 2, 5. Cases cited and points discussed.
- § 643. A mandate is dissolved by the death, insanity, or bankruptcy of either party.

CHAPTER V.

LOANS FOR USE OR BAILMENT OF THINGS FOR USE, WITHOUT
COMPENSATION.

- § 644. The borrower must exercise the utmost care, but not responsible for theft or robbery.
- § 645. The argument and illustrations of Sir William Jones not coincident. The latter seem only to require the borrower to keep within the bailment, and to do as he would by his own.
- § 646. How far the borrower bound to use personally, dependent on circumstances.
- § 647. Some latitude of construction allowed, but not a fundamental departure.
- § 648, and n. 4. The law of New York in terms very strict, but less so in application.
- § 649. The rule in Vermont seems to require only ordinary care.
- § 650. Final summing up of the law on this point. The borrower puts the thing to any other use at his peril, and he must do all that he would to preserve his own property of equal value.
- § 651. The borrower is not responsible for loss by robbery without his fault.

CHAPTER VI.

BAILMENTS FOR HIRE OR REWARD, WHERE NO EXTREME RESPONSIBILITY
IS INCURRED.

- § 652. The terms ordinary, slight, and gross negligence, not well suited to define the duty expected from an ordinary bailee for hire.
- § 653. They seem, all of them, to express something culpable, and not entirely trustworthy.
- § 654. This particular distribution of the degrees of care, or neglect, seems to have been accidental at first, and has been followed, without examination.
- § 655. The law recognizes no degree of negligence as excusable; but defines diligence with reference to the importance and difficulty of the task.

- § 656. In official undertakings, of a merely ministerial character, the bailee is bound to know the law and conform to it in all particulars.
- § 657. One who undertakes professional or mechanical work is bound to do it well, and to do it promptly.
- § 658, and notes. The English judges and civil-law writers require of bailees for hire entire competency and faithfulness.

CHAPTER VII.

PAWN OR PLEDGE.

- § 659. The duty of the pledgee in keeping, use, and disposition of the things pledged.
- § 660. The pledgee may dispose of the pledge in payment of the debt at maturity.
- § 661. Not responsible for theft or robbery, unless he refuse to restore the goods after the bailment expires.
- § 662. What constitutes a mortgage of goods, and the equitable rights of the mortgagee after the law-day is passed.
- § 663. The proper distinction between a pledge and a mortgage.
- § 664. Pledgee may assign debt and pledge. No objection that he has other sufficient security.
- § 665. One may pledge future accessions of existing property.
- § 666. Pledge in security does not suspend right of action on debt.
- § 667. The right of sale, in terms, not inconsistent with pledge.
- § 668. Possession must accompany the pledge, in order to its creation or continuance.
- § 669. The pledge of negotiable securities shuts out all equitable defenses.
- § 670. Coupon bonds pledged are not to be collected by the pledgee, but sold in the market. He may collect the interest coupons.
- § 671. Bond and mortgage secured on real estate may be pledged.
- § 672. Where an illegal debt is secured by pledge, the pledgor cannot recall the pledge without payment of the debt.
- § 673. Factors have no power to pledge the goods of their principals.
- § 674. The pledgee may assign the goods and the debt so as to transfer his interest.

CHAPTER VIII.

THE LETTING OF THINGS FOR HIRE.

- § 675. This species of bailment is divided into different classes. Enumeration.
- § 676. The bailee here impliedly stipulates for skill and diligence sufficient to accomplish the work in a reasonable time and proper manner.
- § 677. Definition of the requisites to constitute a bailment of hiring.
- § 678. The hirer of things is bound to exercise watchfulness to keep them securely.
679. The law will not presume negligence; but the admitted state of facts on the part of the bailee may demand explanation.

CHAPTER IX.

SIMPLE CONTRACT OF HIRING, OR LOCATIO REI.

- § 680. The hirer stipulates for requisite skill and diligence to accomplish the purpose of the bailment prudently and safely.
- § 681. In hiring horses the hirer is bound to feed properly at his own expense, and treat the animals judiciously and prudently; unless where the owner retains control of the team by his driver.
- § 682. The hirer may allow his servants and others to use the thing, he being responsible for their conduct.
- § 683. The right of possession of the thing during the bailment is in the bailee.
- § 684. The hirer not ordinarily responsible for the acts of the servants of the owner.
- § 685. The duties of the hirer as defined in the Roman Civil Law.
- § 686. The same rules obtain substantially in the American courts.
- § 687. If the thing fails to answer the purpose, hirer not bound to pay price.
- § 688. The same rule seems to have been applied to letting of the use of things for a term of time at a fixed price. The price is only due to the extent of the service.

CHAPTER X.

BAILMENTS FOR WORK OR CUSTODY, OR LOCATIO OPERIS ET LOCATIO CUSTODIÆ.

- § 689. This chapter will embrace bailments for work or repair, and also for safe custody.
- § 690. The bailee for work on compensation is responsible both for skill and diligence.
 - n. 1. Summary of the cases on the point.
- § 691. The property and risk of injury in regard to things bailed for work, remains in the bailor, and he will be responsible for the work done, notwithstanding the accidental destruction of the goods. But articles made to order are at the risk of the maker.
- § 692. In cases where the thing delivered for manufacture is not to be returned in specie but in kind, it is a sale and not a bailment.
- § 693. Bailees for hire commonly have a lien for the work and materials furnished by them; exceptions, agisters of cattle, livery-stable keepers. But no lien can be created except by the owner's consent.
- § 694. Where the work is not done in time, or according to contract, the bailor is only responsible for what it benefits him.
- § 695. Extra work, etc.
- § 696. Distribution of several classes of bailments for custody for reward.
- § 697. The agister of cattle or livery-stable keepers only bound to use such care and diligence as prudent men do in their own affairs.
- § 698. The duty of warehousemen, wharfingers, and forwarding merchants.
- § 699. The particular degree of the responsibility of warehousemen further discussed.
- § 700. The master should be held responsible for the larceny of his own servants while holding the goods as his servants.

- § 701. The warehouseman has a lien for his charges.
- § 702. The relation of warehousemen to carriers defined before this.
- § 703. The warehouseman may insure for the full value and recover for the benefit of the general owner.
- § 704. The degree of care required of warehousemen defined.
- § 705. Factors, bailiffs, and commission merchants are bound to exercise skill and faithfulness.
- § 706. This class of bailees have a lien upon the goods and papers in their hands for their charges in regard to the particular business.
- § 707. If the bailee delivers the goods to a wrong person he is guilty of conversion.

CHAPTER XI.

THE REMEDIES ALLOWED AT LAW IN REGARD TO BAILMENTS BOTH AS TO THE PARTIES TO THE CONTRACT AND STRANGERS.

- § 708. Only an outline of the principles here given.
- § 709. The bailee may always maintain an action for any injury to the thing by a stranger.
- § 710. The bailor may also sue in trespass and trover in all such cases, unless he has parted with the right of possession, when he can only bring case.
- § 711. In that case the bailee may have trespass or trover against all who injure the property, even the bailor.
- § 712. The bailor may sue the bailee in assumpsit or case, or if he so pervert the use as to determine the bailment in trespass or trover.
- § 713. The bailee cannot in general dispute the title of the bailor. Some exceptions stated.
- § 714. The bailee not generably liable to action unless made after demand, etc.

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THE LAW

OF

CARRIERS AND TELEGRAPHS.

INTRODUCTION.

THIS general topic, of the law of carriers, is commonly divided by text-writers into public and private carriers, and we have pursued the same course, because it was easier to do so than to explain to the ready comprehension of students, why the latter topic was omitted. But in fact the questions arising under this latter department of the subject are so few, and depend for their solution so precisely upon the same principles which pervade the general subject of bailments, that we should scarcely feel justified in occupying more space here in discussing them, than might with convenience be devoted to them in a treatise upon the general topic of bailments.

But the subject of public, or common carriers, is so important, so extensive, and so peculiar, and almost unique, in its character, that no apology is required for making it the basis of a distinct treatise. And it is, perhaps, not improper to remind the profession in this country, that the latter subject has not yet received the same attention from text-writers in comparison with other legal topics, which its great pecuniary interest would seem to demand, or justify, and which it has received in other countries, and especially in England.

The effort of the present writer will be to produce a compact, reliable, and philosophical analysis of the principles involved, in a perspicuous and readable form, so as to meet the necessities and desires of students, as far as practicable, and at the same time to give such a systematic and thorough analysis of the cases, as to make it entirely answer, in the most perfect manner, all the demands of the profession, and of business men.

We do not suppose, as a general thing, that unprofessional men will be expected to spend much time or money in consulting law books. It is generally cheaper and safer to consult professional advice. But there is now such a vast amount of the business of the country transacted by means of railways, express companies, and telegraphs, that it has become almost indispensable for business men to have some reliable treatise on these subjects always at hand, to enable them to know in advance how to proceed, in order to secure the just responsibility of others, and at the same time not to assume more than their own just share of such responsibility.

The present work has been prepared with great care, in order to secure accuracy and completeness, and at the same time with such a perspicuous and simple arrangement, and so perfect an index, as to enable every one to find, at once, all that shall be desired upon all the topics treated. It is hoped and believed such will be found to be the results, and that it will, on these accounts, be found greatly useful both to the professional and unprofessional, who may desire to consult it, and especially so to students.

PART I.



PRIVATE CARRIERS.

PART I.

PRIVATE CARRIERS.

CHAPTER I.

THE DUTY OF PRIVATE CARRIERS FOR COMPENSATION.

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|---|--|
| § 1. <i>Private carriers bound to same diligence and skill as other bailees for hire.</i> | § 6. <i>Commander of ship-of-war, who takes goods to transport, etc.</i> |
| § 2. <i>Must do all that careful men do in their own business.</i> | § 7. <i>Deputy postmasters bound to care and diligence ; but not as common carriers.</i> |
| § 3. <i>Warehousemen and forwarders responsible to same extent as private carriers.</i> | § 8. <i>Common carrier may become private carrier.</i> |
| § 4. <i>Tow-boat owners and wharfingers also responsible to same extent.</i> | § 9. <i>The burden of proof on the carrier to exonerate himself.</i> |
| § 5. <i>Wharfingers and warehousemen have a lien for charges on the particular goods.</i> | § 10. <i>Judgment unsatisfied, when bar to new action.</i> |

§ 1. PRIVATE CARRIERS for compensation, by which we mean all such as transport goods or merchandise of any kind, or, indeed, any personal property, from one place to another, by means of a special employment for that purpose, and not being common carriers on the same route, are bound to the same diligence and skill as prudent and careful men ordinarily exercise in similar employments.

§ 2. Many of the text-writers, and some courts, have attempted to give a more minute and specific definition of the duty of bailees for reward ; but it all finally comes back to the same point — that they shall do everything, and omit nothing, which careful men are accustomed to do in similar business, where they themselves are both the carriers and owners of the goods.

§ 3. These propositions may be further illustrated by some of the decisions of the courts. A person who carries goods for all who choose to employ him, as a regular business, for compensation, is denominated a common carrier, whose duties will be defined hereafter. But goods while in the custody of a common carrier, awaiting transportation, or, after having been transported, awaiting delivery, are said to be in the keeping of the carrier, as a warehouseman or forwarder, whose duty and responsibility is of the same character as that of a private carrier — that is, of a bailee for compensation.¹

§ 4. So the owners of a steamboat, employed to tow a freight boat for hire, are only responsible as private carriers, and not as common carriers.² So also, a wharfinger, who is a species of warehouseman or forwarder, is only responsible to the same extent as a private carrier.³ A warehouseman is responsible for injury to goods through his negligence, although the goods are subsequently destroyed without his fault, and would have been so destroyed if they had remained uninjured.⁴

§ 5. A wharfinger or warehouseman has a lien upon the particular goods, for the freight and charges already incurred, and may detain them until paid.⁵ But he may deliver part of the same parcel of goods in the same ownership, and retain his lien for all charges upon the residue.⁵ It has sometimes been intimated or doubted, if the warehouseman have not a general lien upon any goods for any balance due him from the owners for charges upon them or any other goods.⁶ But unless there is some contract, or cus-

¹ *Cairns v. Robins*, 8 M. & W. 258; *Cailiff v. Danvers*, 1 Peake, N. P. C. 114; *Cowles v. Pointer*, 26 Miss. 253; *Schmidt v. Blood*, 9 Wend. 268.

² *Caton v. Rumney*, 13 Wend. 387.

³ *Foot v. Storrs*, 2 Barb. Sup. Ct. 326.

⁴ *Powers v. Mitchell*, 3 Hill, 545.

⁵ *Steinman v. Wilkins*, 7 Watts & S. 466; *Schmidt v. Blood*, 9 Wend. 268.

⁶ *King v. Humphrey*, 1 McCl. & Y. 173; *Dresser v. Bosanquet*, 4 B. & S. 460.

tom, or usage to that effect, such a general lien could not be maintained.

§ 6. The commander of a ship of war, who takes on board the bullion of a third person for transportation, is liable personally, for not safely keeping and delivering the same, but only as a private carrier.⁷ And the same degree of responsibility has sometimes been applied to the case of the driver of a stage-coach, who, for the accommodation of the owners, carries packages of money for all who desire it, and for an uniform compensation, without reference to the amount.⁸ But we shall see hereafter that such carriers, as last described, are generally held responsible as common carriers.⁹

§ 7. Deputy postmasters, although bound to exercise watchfulness and diligence in safely keeping and the delivery of letters, according to the requirements of the law,¹⁰ are not responsible as common carriers.¹¹

§ 8. A public or common carrier may become a private carrier, by giving up his general business of carrying for all who wish to employ him, and contracting to carry for a particular person. And if, in such case, he instruct his servants to carry for no other person, he will not be responsible for goods which the servants employed by him take for others; but the party so entrusting goods to them, must look to the responsibility of the servants alone.¹²

§ 9. Where goods are injured while in the custody of a private carrier or warehouseman, the burden is upon him to show that it occurred from some other cause than his want of care, diligence, or skill.¹³

⁷ *Hodgson v. Fullerton*, 4 Taunt. 787; *Hatchwell v. Cooke*, 6 id. 577.

⁸ *Shelden v. Robinson*, 7 N. H. 157.
Post, Ch. III.

¹⁰ *Smith v. Powdich*, Cowp. 182; *Stork v. Harris*, 5 Burr. 2709; *Barnes v. Foley*, 4 id. 2149; *Rouling v. Goodchild*, 3 Wils. 443.

¹¹ *Bolan v. Williamson*, 2 Bay, 551; *Schroyer v. Lynch*, 8 Watts, 453.

¹² *Satterlee v. Groat*, 1 Wend. 272.

¹³ *McKenzie v. Cox*, 9 C. & P. 632.

§ 10. The recovery of judgment without satisfaction, against a private carrier, in an action of assumpsit, for not transporting and delivering the articles according to his contract, is no bar to an action of trover against a third person who has purchased the property of the bailee.¹⁴

¹⁴ *Hyde v. Noble*, 13 N. H. 494.

CHAPTER II.

CARRIERS WITHOUT COMPENSATION.

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|---|---|
| <p>§ 11. <i>This class of carriers not numerous or important.</i></p> <p>§ 12. <i>A contract to convey, without compensation, not binding until entered upon. Then must be faithfully performed.</i></p> <p>§ 13. <i>The duty of a gratuitous bailee depends upon the nature of the property.</i></p> | <p>§ 14. <i>Duty to carry according to his known custom and usage.</i></p> <p>§ 15. <i>Wharfingers and warehousemen not gratuitous bailees.</i></p> <p>§ 16. <i>Interference of bailor will not release bailee.</i></p> <p>§ 17. <i>Gratuitous bailee may maintain action against stranger.</i></p> |
|---|---|

§ 11. THIS class of carriers is not very numerous, and consequently the rights and duties growing out of such undertakings are not very complicated or important. The fact that the leading case of *Coggs v. Bernard*,¹ upon which the whole law of bailments mainly rests, was of this character, is all, perhaps, that has led writers to name this as a special department of the law of carriers.

§ 12. From the case already referred to,¹ and many others which might be, it would appear to be settled that one who undertakes, as private carrier without compensation, to transport goods of any kind, or money, or other movables, from one place to another, although his undertaking is a mere nude pact, and no action will lie upon it, still, if he enter upon the performance of the undertaking, the confidence thereby created on the part of the owner of the goods or other thing, that the carriage will be safely and faithfully performed, creates a sufficient consideration, moving between the parties, to make the contract of binding obligation between them, and if any damage befall the

¹ 2 Ld. Ray. 909 ; s. c. Com. 133.

property, in the course of transportation, through the fault of the carrier, he is responsible for it.²

§ 13. There is a good deal said in the books in regard to the degree of diligence required of a gratuitous bailee; and it is ordinarily expressed by the term, slight care, the breach of which is called gross negligence.³ But we regard these attempts to define the degree of diligence with reference to specific grades, as more or less a failure. The diligence and skill required of all bailees depends upon the nature of the goods and the character of the employment. Thus, a man who is paid for spending his time in keeping safely or transporting goods, is naturally expected to be more watchful than if he was acting without reward.⁴ So, too, a man employed to carry money or other valuable commodity, is expected to use more care to prevent loss or injury, than if he were carrying commodities of great weight and small value, and what would be slight negligence as to one, might be of the grossest character as to the other. All that can fairly be said in regard to the distinction between carriers with and without compensation is, that one is to expend watchfulness in proportion to his reward, and the other such as every honest, fair-minded man would blush to omit, and his friends would blush for him if he did, whether he had compensation or not; as if he should leave choice plants exposed to the frost, or money or valuables in the street.⁵

§ 14. But if the owner knows the carrier's mode of transportation, he will be regarded as expecting his goods carried in the same way.⁶ But one who uses the money entrusted to him for carriage, and then supplies its place

² *Tracy v. Wood*, 3 *Mason*, 132; *Nelson v. Maintosh*, 1 *Stark*. 237; *Kirtlan v. Montgomery*, 1 *Swan*, 452.

³ *Knowles v. A. & St. L. R. Co.*, 38 *Me.* 55; *Storer v. Gowen*, 18 *Me.* 174; *Tompkins v. Saltmarsh*, 14 *S & R.* 275.

⁴ *Briggs v. Taylor*, 28 *Vt.* 180.

⁵ *Langley v. Brown*, 1 *Moore & P.*, 583.

⁶ *Knowles v. A. & St. L. R. Co.*, 38 *Me.* 55.

with his own, and is subsequently robbed of it, is still responsible to the owner.⁷ Steamboats are not responsible for money carried by their servants for others, unless that is made a part of the business of the company.⁸

§ 15. But wharfingers and warehousemen who accept goods for transportation, or keep them for the owners after their arrival, are not to be considered gratuitous bailees.⁹

§ 16. If injury happen to the property while in the custody of the bailee, the interference of the bailor to remedy the evil, will not release the bailee from the consequences of his default.¹⁰

§ 17. A gratuitous bailee has such an interest in the property while in his custody, and is so far responsible for its security, that he may maintain an action against a stranger, for any injury to the property.¹¹

⁷ *Anderson v. Trueman*, Wright, Ohio, 598.

⁸ *Choteau v. Steamboat St. Anthony*, 20 Mo. 519.

⁹ *White v. Humphrey*, 11 Q. B. 43.

¹⁰ *Todd v. Figley*, 7 Watts, 542.

¹¹ *Rooth v. Wilson*, 1 B. & Al. 59.

PART II.



COMMON CARRIERS.

PART II.

COMMON CARRIERS.

CHAPTER I.

INTRODUCTION.

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| § 19. <i>Distinction between public or common and private carriers.</i> | § 21. <i>The precise definition of common carriers.</i> |
| § 20. <i>The distinction further illustrated by the cases.</i> | § 22. <i>Reference to the early cases.</i> |
| | n. 7. <i>Different kinds of bailment.</i> |
| | § 23. <i>Consideration of the more recent cases.</i> |

§ 18. WE have not deemed it important to go much into detail in defining the different classes of carriers. The distinction between common carriers and all other carriers is all that seems entirely pertinent to a treatise upon the subject of common carriers. The distinction between common or public carriers, and such as are merely private carriers, has been already hinted at, and is sufficiently defined below for ordinary practical purposes. But the distinction is further illustrated in numerous cases in the English and American reports.

§ 19. It is generally considered that where the carrier undertakes to carry only for the particular occasion, *pro hac vice*, as it is called, he cannot be held responsible as a common carrier. So, also, if the carrier be employed in carrying for one or a definite number of persons, by way of special undertaking, he is only a private carrier. To constitute one a common carrier he must make that a regular and constant business, or at all events, he must,

for the time, hold himself ready to carry for all persons, indifferently, who choose to employ him.¹

§ 20. In an American case² a common carrier is defined to be one who undertakes for hire or reward to transport from place to place the goods of such as choose to employ him. It need not be his principal business, but merely incidental to other occupations, as when the proprietors of a stage-coach, whose chief business was to carry passengers and transport the mail, allowed the driver to carry parcels not belonging to the passengers, it was held to constitute them common carriers, and as such liable for the loss of a parcel thus committed to their agents. This, we apprehend, is the general rule in regard to stage-coach proprietors. They are regarded as common carriers, and that the act or agreement of the driver, within the range of the business which he is knowingly allowed to transact, will bind the proprietors.³

§ 21. To constitute one a common carrier then he must make it, for the time, a regular employment to carry goods for hire for all who choose to employ him.⁴ The rule embraces the proprietors of stage-wagons and coaches, omnibuses and railways.⁵ The rule will also embrace carters; expressmen, porters, shipowners, and all who engage regularly in the transportation of goods or money, either from town to town, or from place to place in the same town.

§ 22. The definition of a common carrier requires that the service should be for hire or reward, since without that the same degree of responsibility would not arise. But in regard to private contracts for carrying goods or money, it is not important, after the thing is actually undertaken, whether it be for hire or not. That was the point decided

¹ *Gisbourn v. Hurst*, 1 Salk. 249 ; *Upston v. Slark*, 2 C. & P. 598 ; *Gilbart v. Dale*, 1 Nev. & Per. 22.

² *Dwight v. Brewster*, 1 Pick. 50.

³ *F. & M. Bank v. Ch. Transp. Co.*, 23 Vt. 186.

⁴ *Fish v. Chapman*, 2 Kelly, 349, 353.

⁵ *Story, Bailm.*, § 496, and cases cited.

in the celebrated and leading case of *Coggs v. Bernard*,⁶ where it was ruled that if one undertake to carry goods safely and securely, he is responsible for the damages they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage. The opinion of *Holt*, Ch. J., in this case, forms the basis of the present law of bailments, both in this country and in England.⁷

§ 23. There has arisen in the American courts considerable controversy in regard to what precise form of transportation of goods will be sufficient to constitute one a common carrier. But it has been held that railways which take a car for transportation over their road, and take the sole possession and care of it, although it remain on the owner's trucks, are responsible as common carriers.⁸ And in general the same rule is established here as in England, that those who are engaged in the business of carrying for all who apply, indiscriminately, upon a particular route, by whatever mode of transportation they conduct their business, must be regarded as common carriers; while those who undertake to carry in a single instance, for a particular person, not being engaged in the business as a general employment, even for a portion of the time, must be considered private carriers,⁹ and as such are only liable for the care and diligence which careful and diligent men exercise in their own business of equal importance.⁹

⁶ 2 Ld. Ray. 909 ; s. c. Com. 133.

⁷ *Holt*, Ch. J. There are six sorts of bailments. 1. *Depositum* ; or, the mere deposit of goods to keep without benefit or reward. 2. *Commodatum*, where goods are loaned to one for his convenience. 3. Loaning for hire. 4. Pawn or pledge. 5. Goods to be carried or repaired for reward. 6. For the same purpose without reward. It was decided in *Shaw v. Davis*, 7 Mich. 318, that a contract for rafting and running staves does not constitute the party a common carrier, but only an ordinary bailee for hire, which requires ordinary care and diligence.

⁸ *New Jersey Railw. v. Pennsylvania Railw.*, 3 Dutcher, 100.

⁹ *Pennewill v. Cullen*, 5 Harring., Del. 238. See *Dwight v. Brewster*, 1 Pick. 50. The owner of a vessel usually employed in transporting goods from one port of the United States to another, is a common carrier. *Clark v. Richards*, 1 Conn. 54.

CHAPTER II.

DUTY AT COMMON LAW. — RULE OF DAMAGES IN CASE OF BREACH OF DUTY.

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| <p>§ 24. <i>Definition of the responsibility of common carriers. Inevitable accident.</i></p> <p>§ 25. <i>To excuse carrier, force must be above human control, or that of public enemy.</i></p> <p>§ 26. <i>Are insurers against fire, except by lightning.</i></p> <p>§ 27. <i>Instances of perils which excuse carriers.</i></p> <p>§ 28. <i>If carrier expose himself to perils, he must bear the loss, but not of delay, from unknown peril.</i></p> <p>§ 29. <i>Is liable for loss in price, during delay caused by his fault.</i></p> <p>§ 30. <i>Only actual damages can be recovered.</i></p> | <p>§ 31. <i>The same view further illustrated.</i></p> <p>§ 32. <i>In America the rule of damages is more liberal.</i></p> <p>§ 33. <i>Carrier must pay damage caused by negligence.</i></p> <p>§ 34. <i>Carrier bound to follow instructions whether given at the time or before delivery.</i></p> <p>§ 35. <i>Express carriers who undertake to sell commodities entrusted to them, are common carriers of the money received.</i></p> <p>§ 36. <i>Usage to collect and return price will bind carriers.</i></p> |
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§ 24. CARRIERS of goods for hire indifferently for all persons, such as we have defined as common carriers, have, at common law, for a very long time, been held liable for all damage and loss to goods during the carriage, from whatever cause, unless from the act of God, which is limited to inevitable accident, or from the public enemy.¹ The exception of the act of God, or inevitable accident,

¹ This will not of course embrace losses caused by any default of the owner of the goods. The American cases adopting substantially this definition are very numerous. See *Harrell v. Owens*, 1 Dev. & Batt. 273; *Moses v. Norris*, 4 N. H. 304; *Jones v. Pitcher*, 3 Stew. & P. 135; *Sprowl v. Kellar*, 4 id. 382; *Hale v. N. J. Steam Nav. Co.*, 15 Conn. 539.

It is no excuse for the carrier that a greyhound delivered to him, and for which he gave a receipt, was not properly secured at the time of delivery. He was bound to know what was proper fastening, and advise the owner if anything more was required. *Stuart v. Crawley*, 2 Stuart, L. C., 323. See also *Porterfield v. Humphreys*, 8 Humph. 497, where a horse was lost on a steamboat, by escaping from his fastening; and the carrier was held responsible.

has by the decisions of the courts been restricted to such narrow limits, as scarcely to amount to any relief to carriers. It is in reality limited to accidents which come from a force superior to all human agency, either in their production or resistance. Hence many learned judges have contended that the terms "inevitable accident," which were first suggested by Sir William Jones as a more reverent mode of expressing the act of God, do not, in fact, have the same import.²

§ 25. To excuse the carrier, the loss must happen from a strictly superior force, and not a mere human force (unless it be the public enemy), the *vis major* of the civil law, and the casuists. And it would seem that it should not only be a superior force, in the emergency, but one which no human foresight or sagacity could have guarded against.³

² *Forward v. Pittard*, 1 T. R. 27. The language of Lord *Mansfield* is here so pertinent as to bear repetition: "It appears from all the cases for one hundred years back, that there are events for which the carrier is liable, *independent of his contract*." "A carrier is in the nature of an insurer." In defining the act of God, he says: "I consider it to mean something in opposition to the act of man." "The law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings, and tempests." *Richards v. Gilbert*, 5 Day, 415; *McArthur v. Sears*, 21 Wend. 190, 192; *Proprietors of the Trent & Mersey Nav. Co. v. Wood*, 3 Esp. Cases, 127, 131; 4 Doug. 287 (26 Eng. C. L. R. 358). Lord *Mansfield* here says: "The act of God is natural necessity, as wind and storms, which arise from natural causes, and is distinct from inevitable accident." See *Sherman v. Wells*, 28 Barb. 403; *Fergusson v. Brent*, 12 Md. 9. *Le Grand*, Ch. J.: "The act of God" must be the direct and immediate cause of the loss, to excuse the common carrier, and it is no excuse that it was caused by inevitable accident, or produced by the act of God concurring with other agencies. *Sprowl v. Kellar*, 4 Stew. & P. 382. But see *Hill v. Sturgeon*, 28 Mo. 323. In a somewhat recent case, *Read v. Spalding*, 5 Bosw. 395; s. c. 30 N. Y. 630, where goods were damaged by a flood rising higher than ever before, and which it was no negligence not to have anticipated, and from which the goods could not be delivered after the extent of the rise was known, it was held to have occurred by the act of God, unless the carrier was in fault in not having sooner sent the goods to their destination, and if so in fault, then he was responsible. *S. P. Michaels v. N. Y. Centr. Railw.*, 30 N. Y. 564. See also *Merritt v. Earle*, 29 N. Y. 115.

³ *Colt v. McMeichen*, 6 Johns. 160; Opinion of *Kent*, Ch. J.; 1 Smith's L. Cases, 219, ed. 1847; 268, ed. 1852, and the able note of the Am. editor; *McAr-*

In one case,⁴ where the subject was very carefully examined, it was held that the carrier could not excuse himself for delay in transporting goods by showing that the engineers, and other persons in the employ of the company, by combination left their employ and rendered it impracticable to complete their undertaking. Such a result is not to be regarded as the act of God or inevitable accident.

§ 26. Hence carriers are held as insurers against fire, unless caused by lightning.⁵ There are many cases in the books which take such a latitudinarian or speculative view of the extent of injuries by the act of God, as to give

thur v. Sears, 21 Wend. 190; McCall v. Brock, 5 Strob. 119; Dale v. Hall, 1 Wilson, 281; N. B. Steamboat Co. v. Tiers, 4 Zab. 697. Where the loss of goods on board a ship occurred in consequence of the rudder proving defective, internally, from some cause unknown to the owner or master, and where the vessel had been "lately completely repaired," it was nevertheless held the carrier was liable. Backhouse v. Sneed, 1 Murph. 173. And in all cases the owners of river craft are responsible, not only for their own inattention, want of care, and inexperience, but equally for that of their servants. Borne v. Perrault, Stuart, L. C. 591, and note. And even where the goods were on board a lighter, being conveyed to the vessel outside the harbor, and were thrown into the water and damaged by an explosion of the boiler, the vessel was held responsible for the loss, these particular goods being included in the bills of lading signed by the master. Bulkley v. Naumkeag Cotton Co., 24 How. U. S. 386. This case goes upon the ground that the usages of the business requiring the owner of the vessel to employ and pay the lighterman, the delivery to him was a delivery to the master, and the responsibility of common carrier attached thereupon. And the responsibility of a ferryman as a common carrier for carriages, attaches as soon as the same are fairly on the slip or drop of the ferry; and it will not relax on account of the carriage being driven by a servant of the owner. Cohen v. Hume, 1 McCord, Law, 43.).

⁴ Blackstock v. New York & Erie Railw., 1 Bosw. 77. But see also Cox v. Peterson, 30 Alab. 608; Hibler v. McCartney, 31 Alab. 501. There is no invariable rule requiring common carriers to carry freight in the precise order in which it is received, without regard to any other circumstances connected with its character, condition, or liability to perish. Peet v. Chicago & N. W. Railw., 20 Wisc. 594.

⁵ Mershon v. Hobensack, 2 Zab. 372, 379; Forward v. Pittard, 1 T. R. 27; Hyde v. Trent & Mersey Nav. Co., 5 T. R. 389; Gatcliffe v. Bourne, 4 Bing. N. C. 314. And in Ins. Co. v. Ind. & Cin. Railw., Disney, 480, it is held, that in losses by fire the carrier is *primâ facie* liable. See also Porter v. Chicago, &c. Railw., 20 Ill. 407; Parker v. Flagg, 26 Me. 181.

the exception a much broader range, as where the foundering of a ship upon a rock in the ocean, not generally known to navigators, and not known to the master, was held a loss from the act of God.⁶ But if a vessel strike on a rock not hitherto known, it will excuse even common carriers, it has been said, but not if it be laid down in any chart.⁷

§ 27. And so of the loss of a vessel by running upon a

⁶ *Williams v. Grant*, 1 Conn. 487.

⁷ *Pennewille v. Cullen*, 5 Harring. Del. 238. And in *Collier v. Valentine*, 11 Mo. 299, it is said that losses from obstructions in river navigation, where no reliable chart exists, are not governed by the same rules as losses by ocean navigation, where such is the fact. But in the former each case must be judged by its own peculiar circumstances. But it is no excuse for the loss of goods by a common carrier, that his vessel was run into by a steamer in the night and sunk, whereby the goods were lost, provided those in charge of her had not used due care in guarding against such an accident, even where the persons in charge of the steamer were guilty of negligence in her management. *Converse v. Brainard*, 27 Conn. 607. If the fault were solely on the part of the colliding vessel, the carrier is still responsible. *Oakley v. Portsmouth & Ryde Steam Packet Co.*, 11 Exch. 618.

In the case of *De Rothschild v. Royal Mail Steam Packet Co.*, 7 Exch. 734, where the carrier received goods in Panama to be by him delivered in London, "the act of God, the Queen's enemies, pirates, robbers, fire, accidents from machinery, boilers and steam, the dangers of the seas, roads and rivers of what kind or nature, were excepted," and the goods were secretly stolen from a railway truck in passing from Southampton to London, it was held not to come within the exceptions of loss by robbers or the danger of the roads. Since robbers meant those who take by violence in opposition to thieves who take covertly, and dangers by roads meant marine roads, or if it could apply to roads by land, it would only embrace perils peculiar to roads, as the overturning of carriages in rough and precipitous places, etc. It was held, at an early day, that carriers by water could not excuse themselves for loss occasioned by coming in contact with an anchor, to which no buoy appeared to be fastened. *Trent Nav. v. Wood*, 3 Esp. 127. And where damage was done to the goods by water escaping from a steam-pipe cracked by frost, by reason of filling the boiler over night, the carrier is not excused; for although that had been the common usage, it was the fault of the crew. *Siordet v. Hall*, 4 Bing. 607; s. c., 1 M. & P. 561. It is no excuse that the goods were lost by an accidental fire without the fault of the carrier. *Gilmore v. Carman*, 1 Sm. & M. 279; *Potter v. Magrath*, Dudley, 159. Theft by the crew or others is no excuse. *Schieffelin v. Harvey*, 6 Johns. 170. And even where the loss occurs by the shifting of a buoy at the entrance of the harbor, while the ship was absent on her last voyage, it will not excuse the carrier. *Reaves v. Waterman*, 2 Spears, 197.

snag in a river, brought there by a recent freshet.⁸ But these cases have been questioned, and perhaps have not been universally followed. A hurricane or tempest, lightning, and the unexpected obstruction of navigation by frost, have been held to come within the exception to the liability of carriers.⁹

§ 28. And ordinarily, where the negligence of the carrier exposes him to what he might otherwise have escaped, he is responsible for losses thus occurring through the combined agency of his own negligence and inevitable accident, or the public enemy. As where the carrier, without

⁸ *Smyrl v. Nolon*, 2 Bailey, 421; *Faulkner v. Wright*, 1 Rice, 108.

⁹ *Bowman v. Teall*, 23 Wend. 306; *Parsons v. Hardy*, 14 id. 215; *Harris v. Rand*, 4 N. H. 259; *Crosby v. Fitch*, 12 Conn. 410. It has been held, that although a general bill of lading, given by a carrier, containing a general undertaking to carry, is subject, presumptively, to the ordinary exception to the liability of the carrier, of the act of God and the public enemy, it may nevertheless be shown, by oral testimony, that the undertaking was not even subject to that presumptive exception. *Morrison v. Davis*, *infra*. But, query, whether this legal intendment of the bill of lading is any more subject to explanation and contradiction than are the express provisions of the instrument itself. The carrier must show that the loss or damage accrued from causes within the exceptions to his responsibility, created either by law or the contract of the parties. *Cameron v. Rich*, 4 Strobh. Law, 168. And even where the vessel is unseaworthy, or the carrier is otherwise in default, he is not responsible for losses accruing from causes excepted from his undertaking, and in no sense from any defect or default on his part. *Collier v. Valentine*, 11 Mo. 299. Exceptions of the dangers of the river only covers such as are not known and therefore unavoidable by human care and foresight. *Gordon v. Buchanan*, 5 Yerg. 71.

Loss by pirates is regarded as a loss by the public enemy. *Magellan Pirates*, 25 Eng. L. & Eq. 595; s. c. 18 Jur. 18. See *Bland v. Adams Ex. Co.*, 1 Duval, 232. The freezing of perishable articles by reason of an unusual intensity of cold is not such an intervention of the *vis major* as excuses the carrier, if the accident might have been prevented by the exercise of due diligence and care upon his part. The fact that the carrier has done what is usual, is not sufficient to exempt him from a charge of negligence. He must show that he has done what was necessary to be done under all the circumstances. *Wing v. The New York & Erie Railroad Company*, 1 Hilton, 235. So, where goods are thrown overboard in a tempest, by order of the master. *Gillett v. Ellis*, 11 Ill. 579. The master of a steamboat is not liable, for not drying wheat wet by inevitable accident. *Steamboat Lynx v. King*, 12 Mo. 272. There is no such invincible necessity that goods carried by wagon should suffer by rain as to excuse the carrier for damage thereby. *Philleo v. Sandford*, 17 Texas, 227.

necessity or justifiable cause, deviates from the direct or usual course of transportation, and thereby encounters a storm, in which water communicates with the cargo, lime, and ignites it, whereby both ship and cargo are lost, he is responsible upon a declaration charging that it was his duty to carry by the usual course without needless deviation.¹⁰ But if his own neglect was not the proximate cause of the peril being incurred, or, if the neglect was not one which ordinary foresight or sagacity could have apprehended was exposing the goods to extraordinary peril, he is still excused. As, if by having a lame horse he is longer upon his route, and is thus overtaken by a desolating flood upon the canal, he is not responsible for the consequent loss.¹¹

§ 29. But where a delay in the transportation is caused by inevitable accident, a railway company is liable for injury to the goods, by bad handling, in endeavors to expedite the passage. But it is not liable, of course, for a decline in the price of goods during a delay which was inevitable.¹² But where the decline in price happened during a delay in transportation for which there was no legal excuse, the carrier would, no doubt, be liable. And in an action for not delivering goods in a reasonable time, the party is entitled to recover the value of the goods at the time and place where they should have been delivered, and necessary loss and expenses incurred otherwise, if any.¹³

¹⁰ *Davis v. Garrett*, 6 Bing. 716; s. c. 4 M. & P. 540; *Powers v. Davenport*, 7 Blackf. 497; *Lawrence v. McGregor*, Wright, 193.

¹¹ *Morrison v. Davis*, 20 Penn. St. 171, 175.

¹² *Lipford v. Railw. Co.*, 7 Rich. 409; *Galena & Chicago Railw. v. Rae*, 18 Ill. 488; *Denny v. N. Y. Central Railw.*, 13 Gray, 481. And when the cause of delay, as ice or low water, is removed, the duty to transport revives. *Lowe v. Moss*, 12 Ill. 477; *post*, ch. xxiii., xxv.

¹³ *Nettles v. Railw. Co.*, 7 Rich. 190; *Black v. Baxendale*, 1 Exch. 410; *post*, ch. xxiii., xxv.

Where cotton is lost by a common carrier, interest upon its value may be assessed by the jury as a part of the damages, in an action against the carrier for the loss. *Kyle v. Laurens Railw.*, 10 Rich. 382.

In estimating the damages in an action against the carrier for the loss of the

§ 30. The rule of damages, as laid down by the Court of Exchequer in a late case¹⁴ is, that where the carrier fails to deliver in time it is the duty of the owner to sell, directly he receives the goods, at the market prices and realize his loss; and the difference between the price which he obtains, and that which he would have obtained if the goods had been delivered in time, is the only measure of damages. This was a case where hops were sent by common carrier, and the consignee refused to accept them on account of not being delivered in time; and the court held the plaintiff could recover no damage on account of the loss of the bargain between the plaintiff and the consignee.

§ 31. And in another case where goods were not received by the consignee until after the season of their sale had passed, it was held the plaintiff could only recover the difference between the market value of the goods at the time they were received and when they should have been received, and that the profits which the plaintiff would have derived from making up these goods into articles of sale and disposing of them could not to be taken into account.¹⁵

§ 32. But in an action for not delivering machinery in proper time, the measure of damages was held to be the

cotton which he undertook to deliver to plaintiff's factors in Charleston, the amount of factors commissions upon the value should not be allowed the defendant in abatement. *Ib.*

The carrier is bound to carry in a reasonable time, but this is a question of fact, under all the circumstances, and to be submitted to the jury. *Conger v. Hudson River Railw.*, 6 Duer, 275. But it is said here that the carrier is not responsible for delay caused by the fault of a third party, as a collision with the train of another railway through their neglect. Nor is the company liable for damages occasioned by the loss of a market through delay not excused, this being too speculative and contingent. But most of the cases hold otherwise. See *Falway v. Northern Transportation Co.*, 15 Wis. 129, where it was held that a delay in the transportation of goods to Buffalo, from which place they were to be shipped by steamers on the lake, occurring in November, was, in view of the increased dangers of lake navigation as winter approached, *prima facie* proof of negligence.

¹⁴ *Simmons v. Southeastern Railw. Co.*, 7 Jur. N. S. 849; s. c., 7 H. & N. (Am. Ed.) 1002.

¹⁵ *Wilson v. Lanc. & Yorksh. Railw. Co.*, 7 Jur. N. S. 862; s. c., 9 C. B. N. S. 632.

value of the use of the machinery during the period of its improper detention,¹⁶ but that under proper averments and notice and proper proof special damages even beyond this might be recovered.¹⁶ The difference between the last case and some of the preceding, in regard to the rule of damages, seems to be one of policy between the views of the English and American courts, in the one case to enable the owner to realize speculative damages, and in the other to deny all but what is the most obvious actual damage.

§ 33. And where the cars of a railway company are thrown off the track, by reason of running over one who fell from the train in consequence of having no proper place to stand, it is no excuse for any injury caused to freight.¹⁷

§ 34. Carriers of goods by express or otherwise, are always bound to follow instructions given by the owner or his agent, unless that becomes reasonably impracticable. And instructions given antecedently to the delivery of the goods, but in contemplation of such delivery, on the part both of the owner and carrier, are of the same binding force as if given at the very time of the delivery.¹⁸

§ 35. And where carriers by express undertake to dispose of commodities entrusted to them, and return the price, they must be regarded as common carriers of the money as well as the goods, and are not relieved of their extreme responsibility upon the receipt of the money, unless there is some contract or understanding allowing them to use the money, and if so, they would become debtors for it upon the receipt of it.¹⁹

§ 36. So also, where goods are sent by express, with

¹⁶ *Priestly v. Northern Ind. & Chicago Railw. Co.*, 26 Ill. 205; *post*, ch. xxiii., xxv.

¹⁷ *Goldey v. Penn. Railw.* 30 Penn. St. 242.

¹⁸ *Streeter v. Horlock*, 7 Moore, 283; s. c. 1 Bing. 34.

¹⁹ *Harrington v. McShane*, 4 Watts, 443; *Kemp v. Coughtry*, 11 Johns. 107; *Galloway v. Hughes*, 1 Bailey, 553. See *Emery v. Hussy*, 4 Greenl. 407; *Moseley v. Lord*, 2 Conn. 389.

directions to collect the price on delivery, as where the receipt for the goods, signed by the agent of the company, was marked, "356.34, C. O. D.," which the agent testified meant that the company undertook to collect \$356.34, on delivery of the goods, and return the amount to the consignors, it was held the evidence was admissible, and the company bound by the act of their agent.²⁰ But it has sometimes been doubted whether the master of a ship can bind the owners to return the price of commodities shipped, unless there is a usage to that effect.²¹ But such a usage is not uncommon, and will ordinarily bind the owner to such an undertaking on the part of the carrier, although made by his servants.²²

²⁰ *American Express Co. v. Lesem*, 39 Ill. 312.

²¹ *Taylor v. Wells*, 3 Watts, 65.

²² *Galloway v. Hughes*, 1 Bailey, 553.

CHAPTER III.

RAILWAY COMPANIES COMMON CARRIERS.

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| § 37. <i>Railway companies and others who carry for all who apply are common carriers.</i>
§ 38. <i>Under the English statute entitled to notice of claim.</i> | § 39. <i>Railways also made liable as common carriers of passenger's baggage and of freight.</i>
§ 40. <i>Responsibility results from the office, and action may be in tort or contract.</i> |
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§ 37. It was decided at an early day that persons assuming to carry goods upon railways for all who applied, were to be held as common carriers, and indeed it is now regarded as an elementary principle in the law that all who carry goods, in any mode, for all who apply, are common carriers.¹

¹ *Parker v. Great Western Railw.*, 7 Man. & G. 253; *Muschamp v. Lancaster Railw.*, 8 M. & W. 421; *Palmer v. Grand Junction Railw. Co.*, 4 M. & W. 749; *Pickford v. Grand Junction Railw.*, 12 M. & W. 766; *Eagle v. White*, 6 Whart. 505; *Weed v. S. & S. Railw. Co.*, 19 Wend. 534; *Camden & Amboy Railw. Co. v. Burke*, 13 id. 611; *Story on Bailments*, § 500; *Angell on Carriers*, § 78. In the case of *Fuller v. The Naugatuck Railw.*, 21 Conn. 570, it is said that in order to charge railways as common carriers, it is not necessary to allege that they had power under their charter to become common carriers; but that having assumed the office and duty of common carriers of freight and passengers, they are thereby estopped to deny their obligations, therefrom resulting, by falling back upon any limited construction of their powers under their charter. But a railway may become a common carrier of goods, and not in consequence be necessarily responsible for money or bank bills. That depends on their own usage or consent. *C. & A. Railw. v. Thompson*, 9 Ill. 578; *Allen v. Sewall*, 2 Wend. 327. The same rule of construction in regard to the liabilities of railways was adopted in *Welling v. The Western Vermont Railw.*, 27 Vt. 399, and in *Noyes v. The Rutland & Burlington Railw.*, 27 Vt. 110. The citation of cases under this head might be multiplied almost indefinitely. In *Jones v. Western Vermont Railw.*, 27 Vt. 399, it is laid down as the governing principle of the case, that the company are liable even for torts committed by their agent or servants, within the apparent scope of their authority, or in the pursuit of the general purpose of

And if natural persons have the management and control of a railway, as receivers appointed by a court of equity, they are responsible as common carriers, if they hold themselves out as such, the same as the corporation would have been before it was placed in the hands of receivers.² And a street railway corporation will be responsible as common carriers, if they allow their drivers and conductors to take, carry, and deliver trunks and parcels for hire. And what is done by the conductors with the knowledge and consent, express or implied, of the superintendents, will bind the company.³ Steamboats which carry freight and parcels for all who apply, are responsible as common carriers.⁴ And a wagoner who does the same, is responsible as a common carrier, even when he does not make that his regular and principal business.⁵ And where one employed his boat to carry his own cotton, and occasionally carried that of his neigh-

the charter, and where the departure from the general scope of the charter powers is not such as to be notice to all, that the agent is departing from the proper business of the corporation. One of the three last was a case where the railway company so constructed an embankment as to serve the purpose of a dam to create a reservoir for the accommodation of the mill-owners below, whereby the company obtained some indirect advantage in regard to compensation to land-owners, through whose land they were constructing the embankment. The embankment was so defectively constructed, that it yielded to the pressure of the water, and caused damage to the proprietors below, by the sudden outbreak of the waters, and the company were held liable for the injury thereby sustained.

In England, it is not uncommon to convert railway structures, by means of additions, into stables, and even dwelling-houses, which the company let to tenants. Such buildings, although subject to the poor-rate, are not regarded as under the supervision of the metropolitan surveyors of buildings, as to fire, party-walls, roofs, and the right to order buildings pulled down, forming as they do, an important and indispensable portion of the railway structures. *N. Kent Railw. v. Badger*, 30 Law Times, 285; s. c., *nom. Badger in re*, 8 El. & Bl. 728; *Russell v. Livingston*, 19 Barb. 346; s. c., 16 N. Y. 515.

² *Blumenthal v. Brainerd*, 38 Vt. 402. A receiver may be protected from an action at law by the order of the court of equity appointing him; but otherwise he is liable the same as if he were not a receiver.

³ *Levi v. Lynn & Boston Railw.*, 11 Allen, 300.

⁴ *Bank of Orange v. Brown*, 3 Wend. 158.

⁵ *Gordon v. Hutchinson*, 1 Watts & S. 285; *Chevallier v. Strahan*, 2 Tex. 115.

bors, it was held he was responsible as a common carrier, and bound by the act of his captain in taking freight, although applications for that purpose were usually made to himself.⁶ So a boatman employed in the transportation of property on the canals, is a common carrier.⁷ And public ferrymen are regarded as common carriers.⁸ One who holds himself out as a common carrier, ready to undertake for all who call, is a common carrier on his first trip, as much as after his business has settled into a fixed usage.⁹ But one who is employed with his ship to carry a single load of grain for an agreed price, and who had not offered his vessel for public use, or held himself out as a common carrier, is not responsible as such.¹⁰

§ 38. Some of the English statutes require notice of any claim against railway companies, for default in any undertaking under their charters, before suit brought. But under such statutes it has been held that no such previous notice is necessary where the act complained of is negligence in carrying goods or passengers, this not being a suit for anything done under the act within the meaning of the statute requiring notice.¹¹ But it is held that where the action was brought to recover the excess of charges for carrying goods above what was charged others for similar service, the company were entitled to notice of the claim before action.¹²

⁶ *McClure v. Richardson*, 1 Rice, 215.

⁷ *Arnold v. Halenbake*, 5 Wendell, 33.

⁸ *Rabrosk v. Herbert*, 3 Alab. 392.

⁹ *Fuller v. Bradley*, 25 Penn. St. 120; *Kiston v. Hildebrand*, 9 B. Mon. 72; *Simmons v. Law*, 8 Bosw. 213.

¹⁰ *Allen v. Sackrider*, 37 N. Y. 341.

¹¹ *Carpue v. The London & Brighton Railw. Co.*, 5 Q. B. 747; *Palmer v. Grand Junction Railw. Co.*, 4 M. & W. 749.

Proof of the delivery of goods to a common carrier, and of a demand and refusal of the goods, or of their loss, throws upon the carrier the burden of showing some legal excuse. *Alden v. Pearson*, 3 Gray, 342.

¹² *Kent v. The Great Western Railw. Co.*, 4 Railw. C. 699; s. c., 3 C. B. 714. This action is similar to *Parker v. Great Western Railw. Co.*, 3 Railw. C. 563; s. c. 7 M. & G. 253; 7 Scott N. R. 835. In these cases, it was held, the taking of tolls is an act done in the execution of their charter powers.

§ 39. By the English statute, the Railways Clauses Act, railways, stage-coach proprietors, and other common carriers of passengers, their baggage and other freight, are put upon precisely the same ground, both as to liability and as to any protection, privilege, or exemption. The same rule obtains in this country, except, perhaps, that inasmuch as this mode of transportation is infinitely more perilous to the lives of passengers, a proportionate degree of watchfulness is demanded of the carriers of passengers in this mode. But this is but extending a general principle of the law to this particular subject, to wit, that care and diligence are relative terms, and the degree of care and watchfulness are to be increased in proportion to the hazard of the business.¹³

§ 40. It has long been settled that the responsibility of common carriers results not from any contract, or from any implied undertaking or understanding between the parties, but from the nature of the office or business; and that the declaration may be in form *ex delicto* as well as *ex contractu*, and that in the former case a verdict may pass against some of the defendants and in favor of others.¹⁴

¹³ Commonwealth v. Power, 7 Met. 601; Jencks v. Coleman, 2 Sumner, 221; Camden and Amboy Railw. v. Burke, 13 Wend. 611; Pardee v. Drew, 25 Wend. 459. Carriers from places within the realm to places without, are subject to the same liability as carriers who carry only within the realm. Crouch v. London & North W. Railw., 25 Eng. L. & Eq. 287; s. c. 14 C. B. 255.

¹⁴ Pozzi v. Shipton, 8 Ad. & Ellis, 963; 1 P. & D. 4; 1 W. W. & H. 624; Bretherton v. Wood, 3 Bro. & B. 54.

CHAPTER IV.

LIABILITY FOR PARCELS CARRIED BY EXPRESS AND FOR ACTS OF AGENTS.

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| § 41. Carriers, who allow servants to carry parcels, are liable for loss. | § 52. Agent authorized to procure goods is competent to bind the owner by conditions accepted by him. |
| § 42. Importance of making railways liable for acts of agents. | § 53. Express company bound for safe carriage through its line, and for safe delivery to the next express agent, and in many cases for safe delivery at the point of destination. |
| § 43. Allowing perquisites to go to agents will not excuse company. | § 54. They cannot be excused from this except on the ground of a clear and understanding stipulation to that effect on the part of the employer, and in a particular which is reasonable and not against good morals or good policy. |
| § 44. Owner of parcels, carried by express, may look to company. | § 55. Express carriers must deliver at the earliest moment in regular business hours. |
| § 45. May sue subsequent carrier, who is in fault. | § 56 & n. 25. Propositions declared in California case, and comments on the same. |
| § 46. European railway companies are express carriers. | § 57. Restrictive limitations in other cases. |
| § 47. Express companies responsible as common carriers. | § 58. Inconvenience no excuse for omitting personal delivery. |
| § 48. Such companies who carry parcels or baggage from one city to another or from one depot to another, are common carriers. | § 59. The consignee entitled to inspect goods. |
| § 49. Omnibus lines and railways common carriers <i>ex vi termini</i> . | § 60. Notice brought home to the other party will, in general, control the carrier's responsibility except for negligence. |
| § 50. Express companies held to deliver to consignee. | |
| § 51. The extent and mode in which express companies may restrict their responsibility. | |

§ 41. It may perhaps be assumed, that upon general principles common carriers who allow their servants, as the drivers of stage-coaches and the captains of steamboats, or the conductors of railway trains, to carry parcels, are liable for their safe delivery, whether they themselves

derive any advantage from the transactions or not. Our own views upon this subject were expressed in a late case:¹ —

1 *Farmers' & Mechanics' Bank v. The Champlain Transportation Co.*, 23 Vt. 186, 203, 204. But it is said, in some of the elementary writers, and by some judges, that if such servant is allowed to do this, as a mere gratuity to him of the perquisites, and this is known to those who employ him, his principals are not liable for his default. 1 *Parsons on Cont.*, 656; *King v. Lenox*, 19 Johns. 235. This was a case where the owner of the ship freighted her himself, and the master had no authority to take freight from others, and this known to those who employed him. *Walter v. Brewer*, 11 Mass. 99; *Reynolds v. Toppan*, 15 Mass. 370; *Butler v. Basing*, 2 C. & P. 613. But see the opinion of the court, in 23 Vt. 203, upon this point, where it is said: "It seems to us that this case is distinguishable from those, where it has been held incumbent upon the plaintiffs to show, by positive proof, that the company consented to the captain of their boat carrying money *on their account*, in order to hold the company responsible for the loss of the money. *Sewall v. Allen*, 6 Wend. 351, reversing the judgment in *Allen v. Sewall*, 2 Wend. 327, is one of that class of cases, so far as the determination of the Court of Errors is concerned. And that determination seems to meet with approbation in *Angell on Carriers*, § 101, and note 4. And *Story, J.*, in *Citizens' Bank v. Nantucket, S. B. Co.*, 2 Story, 16, and *Chancellor Kent*, 2 Kent, 609, seem also to approve the decision of the Court of Errors. But these cases, and the writers named, adopt this view of the subject, upon the ground that the charter of the company limits their business to the carrying of 'goods, wares, and merchandise,' and that bank-bills are neither, and so the company *primâ facie* are not liable; and not liable in any event, unless they have given their consent to their proper business being enlarged, so as to include bank-bills, and also that this was a suit against the stockholders in their individual capacity, under the charter. Upon this narrow view of that case, the decision of the Court of Errors may stand; but, as applicable to a company, whose charter, on the face of it, does include the carrying of bank-bills, and in a suit directly against the corporation, it seems to us the reasoning is altogether unsound and unsatisfactory. And, unless that case is to be distinguished from the present, upon the ground of the restricted nature of the charter of that company, we should certainly incline to the opinion of the Supreme Court of New York, in *Allen v. Sewall*, rather than that of the Court of Errors. Mr. Justice Story (in 2 Story, *ut supra*) seems to admit, that, upon general principles, the captain's contract will bind the company to the extent of the charter powers."

But see *Chateau v. Steamboat St. Anthony*, 16 Mo. 216. Where the clerk of a steamboat carried money letters, as a mere gratuity, it was held that this did not render the proprietors of the boat liable as common carriers, but only as gratuitous bailees, for loss by gross neglect. *Haynie v. Waring & Co.*, 29 Alab. 263. But the rule in the text is maintained in *Mayall v. Boston & Maine Railw.*, 19 New H. 122. See the opinion of *Gilchrist, Ch. J.*, in the last case. In a suit against the owners of a steamboat to recover the value of a package of money entrusted to the clerk of the boat, to be transported to another port, it was held

"It seems to us that when a natural person, or a corporation whose powers are altogether unrestricted, erect a steamboat, appoint a captain and other agents to take the entire control of their boat, and thus enter upon the carrying business from port to port, they do constitute the captain their general agent, to carry all such commodities as he may choose to contract to carry within the scope of the powers of the owners of the boat. If this were not so it would form a wonderful exception to the general law of agency, and one in which the public would not very readily acquiesce.

§ 42. "There is hardly any business in the country where it is so important to maintain the authority of agents as in this matter of carrying, by these invisible corporations, who have no local habitation, and no existence or power of action except through these same agents, by whom almost the entire carrying business of the country is now conducted. If then the captains of these boats are to be regarded as the general agents of the owners, —and we can hardly conceive how it can be regarded otherwise, — whatever commodities, within the limits of the powers of the owners, the captains as their general agents assume to carry for hire, the liability of the owners as carriers is thereby fixed, and they will be held responsible for all losses ; unless, from the course of business of these boats, the plaintiffs did know, or upon reasonable inquiry might have learned, that the captains were entrusted with no such authority. *Primâ facie* the owners are liable for all contracts for carrying made by the captains, or other general agents for that purpose, within the

that the liability of the carrier in such case is to be determined by an inquiry into the nature and extent of the employment and business in which he holds himself out to the public to be engaged. And that proof of the usage of the clerks of such boats to receive and carry such packages from one port to another without hire, in the expectation that such boat would be preferred by these parties in their shipment of freight, is insufficient to bind the owners. *Cincinnati & Lou. Mail Line Co. v. Boal*, 15 Ind. 345.

powers of the owners themselves, and the *onus* rests upon them to show that the plaintiffs had made a private contract with the captain, which it was understood should be kept from the knowledge of the defendants, or else had given credit exclusively to the captain.²

§ 43. "But it does not appear to us that the mere fact that the captain was, by the company, permitted to take the perquisites of carrying these parcels, will be sufficient to exonerate the company from liability. Their suffering him to continue to carry bank-bills ought, we think, to be regarded as fixing their responsibility, and allowing the captain to take the perquisites, as an arrangement among themselves. But we are aware that the question, with whom was the contract, and to whom the credit was given, will generally be one of fact to some extent."

§ 44. And the general law upon this subject is well stated by the highest tribunal in the country, in an important case by Mr. Justice *Nelson*.³ In this case it was considered that the owner of parcels carried by express might look to the responsibility of the company as common carriers, treating the express company as the agents of the owners of property carried, and that they were entitled to sue in their own names upon any contract, express or implied, existing, in relation to the things carried, between the express company and the principal carriers.

§ 45. It is upon the same principle that the owner of goods is allowed to sue any of the subsequent carriers in the line of transportation, guilty of a default in duty, although his contract was made with the first carrier, to whom he delivered the goods.⁴ This is indeed but a gen-

² *Butler v. Basing*, 2 C. & P. 613.

³ *New Jersey Steam Nav. Co. v. The Merchants' Bank*, 6 Howard, 344. And it will not exonerate the railway company from its responsibility as a common carrier, because the owner of the goods furnishes his own car, in which the property is transported, and assumes the loading and unloading, and furnishes a brakeman to accompany the car. *Mallory v. Tioga Railw. Co.*, 39 Barb. 488.

⁴ *Sanderson v. Lamberton*, 6 Binney, 129.

eral principle of the law of contracts, familiar to every lawyer,⁵ that contracts made by or with agents, may be enforced by suits in the name of the principal, by whom or with whom the contracts were made. And there is another principle of law applicable to the subject, which will enable the owner of the goods to maintain an action against any carrier upon whose line loss or injury occurred, *i. e.* that every carrier is liable *in tort* for his own default, or breach of duty, without reference to the special or express contract in the case.⁶ And where a box containing goods, some of which was the property of one of the plaintiffs and some of another, was delivered to a railway company by a third party on behalf of the plaintiffs, the box being addressed to one of the plaintiffs, and was received by him at the place of destination, but the contents had been abstracted, it was held there was evidence of a

⁵ *Lapham v. Green*, 9 Vt. 407; *Young v. Hunter*, 4 Taunt. 582; *Paterson v. Gandasequi*, 15 East, 62; *Denman*, Ch. J., in *Sims v. Bond*, 5 B. & Ad. 389. But see *Weed v. S. & S. Railw.*, 19 Wend. 534, where the principals, it is said, cannot sue, on a contract made by their agent to carry his trunk and money for expenses, if the trunk is not their property, but borrowed by the agent. In *Stoddard v. Long Island Railw.*, 5 Sandf. 180, it was held that the owners of the goods were bound, by any special contract, between the agents for forwarding and the company upon whose trains the goods were forwarded. In *Steamboat Co. v. Atkins & Co.*, 22 Penn. St. 522, it was considered that the forwarding merchant had such an interest in a contract made by him for forwarding goods, that he might maintain an action in his own name for a violation of it. But see *King v. Richards*, 6 Whart. 418; opinion of *Fletcher, J.*, in *Robinson v. Baker*, 5 Cush. 145. See, in confirmation of the rule laid down in the text, *Langworthy v. New York & New H. Railw.*, 2 E. D. Smith, 195.

But in order to charge the carrier by a delivery to the servant, it must appear that it was the business, or, at least, the practice of the servant, to receive such parcels for carriage, otherwise the carrier is not liable. *Blanchard v. Isaacs*, 3 Barb. S. C. 388; *Fisher v. Geddes*, 15 La. Ann. 14. In *Cronkite v. Wells*, 32 N. Y. 247, it was held, that a delivery of a package to the clerk of the agent of an express company, outside the office, is not a delivery to the company, so as to make them responsible for the loss of the package, before it came into the hands of the agent. And the fact that the clerk was accustomed to receive such packages and receipt for them, or that the former agents of the company were accustomed to receive such packages of the plaintiff outside the office, will make no difference.

⁶ See 1 Chitty on Pleading, 134.

joint bailment, in respect of which a joint action might be brought for the loss of the goods.⁷ But it was considered that the mere breaking of the box and abstraction of the contents was not evidence of the commission of felony by the company's servants which could be submitted to the jury, although shown to have occurred while in the charge of the company.⁷

§ 46. In England and upon the continent, it is the uniform practice for the companies themselves to carry parcels, by express, which is here done by others chiefly, under contracts with the company.

§ 47. But it cannot be questioned, we think, that the express companies who receive goods for transportation to remote points, without any special undertaking except what is implied from the manner of accepting the charge, are responsible as common carriers,⁸ and so are also the companies employed by such expressmen to perform the transportation, without being entitled to claim any exemption from the full measure of their responsibility for care and diligence, on the ground of any special arrangement between themselves and those from whom they accepted the goods.⁹

⁷ *Metcalf v. London Br. & South Coast Railw.*, 4 C. B. (N. S.) 307, 311.

⁸ *Mercantile Mutual Insurance Co. v. Chase*, 1 E. D. Smith, 115; *Sherman v. Welles*, 28 Barb. 403; *Baldwin v. The American Express Co.*, 23 Ill. 197; s. c., 26 id. 504; *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189.

⁹ *Langworthy v. New York & H. Railw.*, 2 E. D. Smith, 195. In England, and upon the continent of Europe, the railway companies act as the carriers of parcels of all sizes and kinds, although, as before stated, they also carry packed parcels addressed to different consignees, and in the charge of some general or special agent acting on behalf of the consignees. In all such cases, whether such packed parcels are in charge of a general express agent, who makes that his constant employment, between certain points, and who would thereby himself incur also the responsibilities of a common carrier, or of a special agent of the consignees, acting upon a single occasion, and who would thereby himself incur only the responsibility of an ordinary agent, in both cases the owners have a right to resort to the responsibility of the company conveying the packages, and to hold them responsible to the full extent of common carriers generally, unless there is some stipulation between the company and the agents from whom they

§ 48. Such companies as follow the business of carrying parcels between New York and Brooklyn, and such as carry the baggage of passengers from one depot to an-

received the goods, that they shall incur a less degree of responsibility. *Baxendale v. Western Railw. Co.*, 5 C. B. (N. S.) 336; *Garton v. Bristol & Exeter Railw. Co.*, 7 Jur. (N. S.) 1234; s. c., 1 B. & S. 112; *Branly v. Southeastern Railw. Co.*, 9 Jur. (N. S.) 329; s. c., 12 C. B. (N. S.) 63.

The same rule was established in this country, as it were, in the very infancy of transportation by express companies, in a case where the property was of considerable value (\$18,000), and where the subject was considered and discussed in all its bearings by the Supreme Court of the United States. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344. The leading opinion of the court was here delivered by Mr. Justice *Nelson*, and concurred in by Chief Justice *Taney* and Justices *McLean* and *Wayne*. Some of the other judges concurred in the result, but upon other grounds, and others dissented, but chiefly upon the ground of want of jurisdiction in the court, the suit being instituted in admiralty. This case must be considered as the leading American case, in regard to the duties of railways and steamboats, in the transportation of express packages, while in charge of the express agent.

The package in question in this case, had been intrusted by the plaintiffs below to William F. Harnden, a resident of Boston, and the originator, probably, of this mode of transportation upon railways and steamboats, who was, at the time, engaged in carrying "small packages of goods, specie, and bundles of all kinds, daily, for any persons choosing to employ him, to and from the cities of Boston and New York, using the public conveyances between those cities as the mode of transportation." He had entered into an agreement with the plaintiffs in error, the defendants below, by which, for \$250 per month, he was allowed to transport upon their steamers his crate of parcels, "contents unknown;" the crate and its contents to be at all times at Harnden's risk, and the company "not, in any event, to be responsible, either to him or his employers, for the loss of any goods or other things transported under the contract." Public notice was required to be given by Harnden to this effect, and he was also required to insert this condition, exempting the steamboat company from responsibility, in the receipt which he gave for goods transported by him upon their boats. This condition was in the following terms: "Take notice. William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be and is transported, in respect to it, or its contents, at any time." The \$18,000 was specie which the plaintiffs had employed Harnden to collect for them in the city of New York.

The points decided in this case are thus stated: The general owner of specie who has employed an expressman to transport it for him, may maintain an action against the carriers employed by such expressman, and who are the proprietors of a steamboat upon which the same is transported, for its loss, through the fault of such proprietors, or their agents. But in such cases, the rights of the general owner are controlled by a valid contract between the expressman and the car-

other in the city of New York, are common carriers, and liable as such.¹⁰

§ 49. And it has been said that the courts are justified in assuming that the owners of omnibus lines are common carriers *ex vi termini*, and without any distinct evidence upon the point.¹¹ And railways are regarded as common carriers, although not so named in their charter.¹²

§ 50. One of the distinctive characteristics of this mode of transportation is, that the companies, whether their line is by land or by water, or partly of each, undertake to deliver to the consignees, in the same manner all common carriers by land did, before railways came into general use,¹³ it being now well established, that in the ordinary railway transportation, by common carriers of goods, there is no obligation after the goods reach their appointed destination, but to put them safely in warehouse.¹⁴ It was mainly to remedy this defect in railway transportation of parcels of great value in small compass, that express companies were first instituted in America. That these companies are to be held ordinarily to personal delivery has been so often decided, as scarcely to require the citation of cases.¹⁵

§ 51. Very important questions constantly arise in the courts, in regard to the extent of the limitation of the responsibility of these companies, by reason of conditions of that character, inserted in their receipts or bills of lading,

riers employed by him. A stipulation, however, in such contract, that the carriers are not to be responsible in any event for loss or damage, cannot be construed to exonerate them for losses caused by their own want of ordinary care. We are not aware that these propositions have been seriously questioned or essentially qualified in the subsequent cases. The same rule is now firmly established in most of the American States. *Buckland v. Adams Express Co.*, 97 Mass. 124. See also *Southern Express Co. v. Newby*, 36 Ga. 635.

¹⁰ *Richards v. Wescott*, 2 Bosw. 589.

¹¹ *Parmelee v. McNulty*, 19 Ill. 556.

¹² *Chicago & Aurora Railw. v. Thompson*, 19 Ill. 578.

¹³ *Post*, ch. x., and cases cited.

¹⁴ *Post*, ch. x., pl. 19 and cases cited.

¹⁵ *Baldwin v. The American Express Co.*, 23 Ill. 197; s. c., 26 id. 504.

given at the time of accepting parcels for transportation. These limitations or conditions are binding to the same extent as in the case of other carriers.¹⁶ It will be seen by reference to the discussion of the point,¹⁶ that these limitations must be made in such a mode as: 1. Presumptively to have come to the knowledge of the owner of the goods, or his agent, authorized to act on his behalf; 2. They must be of such a natural and reasonable character, that the law can recognize them as not inconsistent with good policy and fair dealing, or in other words, as being reasonable.

§ 52. A nice question may sometimes arise, in regard to the effect of a receipt from an express company, containing conditions qualifying the responsibility of the carrier, having become binding on the owner of the goods, by reason of being accepted by his authorized agent. As a general rule, the agent to whom the owner entrusts the goods for delivery, must be regarded as having authority to stipulate for the terms of transportation. By this we do not mean the porter or cabman, or mere servant, but the consignor of the goods, or any other agent of the owner, who purchases or procures them for him.¹⁷ In a recent English case¹⁸ it was held, that where in the receipt for the goods delivered to the agent entrusted with the goods, under the head "conditions," was written: "No claim for deficiency, damage, or detention will be allowed, unless made within three days after the delivery of the goods; nor for loss, unless made within seven days from the time they should have been delivered;" and the plaintiff testified: "He was told to sign the paper and did so; he might have seen the word conditions, but did not read them, and was not told what they were;" and one of the

¹⁶ *Post*, ch. xii., xiii., xiv.

¹⁷ *London & Northwestern Railw. Co. v. Bartlett*, 7 H. & N. 400; s. c., 8 Jur. N. S. 58.

¹⁸ *Lewis v. Great Western Railw. Co.*, 5 H. & N. 867.

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packages was not delivered, and was not called for within seven days of the time it should have been delivered; and it was held there was nothing to rebut the presumption, arising from the signature of the paper by the plaintiff, that he understood the contract was subject to the conditions; and they were considered just and reasonable within the statute.

§ 53. It is an important practical question, how far express companies are responsible for the delivery of goods at their point of destination, when the line consists of several independent companies. We see no reason why there should be any legal distinction, in regard to this point, between express and other classes of common carriers. But in America, where the English rule of holding common carriers generally responsible for the ultimate delivery of parcels beyond their own line, does not obtain, the practical inference, resulting from the manner of transacting the business, will often be of importance, as indicating the natural inference and probable understanding of the parties, to be gathered from the transaction, whether it become a question of construction, resulting from the attending facts and circumstances, or remain a pure matter of fact to be judged of by the jury. Where there is a business connection between the different companies, although not amounting to an entire consolidation of interest, it is natural and proper the courts should hold the first company responsible to the same extent as in other cases of common carriers of goods or passengers' baggage.¹⁹ And where the receipt given by the express company contains an unqualified stipulation to deliver to the consignee, describing his place of residence or business, the first company will be bound to deliver according to the stipulation. And where the cost of transportation throughout the entire route is paid to the first carrier, that will naturally

¹⁹ *Post*, ch. xv., pl. 4, n. 11, 12, and cases cited.

raise an implication to perform the carriage paid for, unless some limitation of responsibility is specially stated in the receipt or bill of lading. But in general the undertaking of an expressman is to be construed like that of other carriers, to carry safely to the end of his route and deliver, in like good condition as received, to the next carrier upon the line,²⁰ with proper directions.

§ 54. There can be no question, express companies may claim the same exemption and the same indemnity as other carriers, on the ground of bad package, the dangerous nature of the articles and the want of proper notice at the time of receiving them.²¹ And the courts have recently manifested a disposition, in some States, to hold a firmer hand upon common carriers, in regard to the general tendency to reduce their common-law responsibility, by means of general notices, or somewhat covert conditions in their bills of lading, to the same standard as that of ordinary bailees. It seems always to have been held in Ohio, that common carriers could not, by general notices brought home to the owner of goods and not objected to by him at the time, so restrict their responsibility as to excuse themselves for just and reasonable liability for the ordinary hazards of the business.²² And in Massachusetts it has been recently declared that a common carrier cannot by general notice exonerate himself from his legal responsibility, or fix a limit beyond which he shall not be held liable.²³ The result of all which seems to be, that the courts are ready to allow express companies, and all common carriers, to make reasonable regulations, in regard to the mode of conducting business with their employers, as to notices, insurance, and the rate of compensation; but

²⁰ *Post*, ch. xv. and notes and cases cited; *id.* pl. 6, n. 15, pl. 7, n. 16; *Northern Railw. Co. v. Fitchburg Railw. Co.*, 6 Allen, 254.

²¹ *Post*, ch. xxi. and cases cited.

²² *Graham & Co. v. Davis & Co.*, 4 Ohio N. S. 362. *Scott, J.*, in *Welsh v. Pittsburg, Fort Wayne, and Chicago Railway Co.*, 10 Ohio (N. S.) 65, citing *Jones v. Voorhes*, 10 Ohio, 145.

²³ *Judson v. Western Railway Company*, 6 Allen, 486.

they do not favor the repeal of the common-law responsibility of common carriers, unless when it is clear that the employer has understandingly and freely stipulated for such exemption. In a recent case²⁴ in Missouri it was declared to be the *primâ facie* duty of all carriers to carry safely and deliver to the consignee, subject to the conditions that this did not require the carrier to go beyond his own line, or perform service inconsistent with the general course of his business.

§ 55. As to the particular time and mode of delivery by express carriers, it has been held, that such carrier should deliver at the place of business of the consignee as early as practicable after arrival and within the usual business hours.²⁵

§ 56. In one case²⁶ the following propositions are declared: Restrictions upon the common-law responsibilities of common carriers, for their benefit, inserted in a receipt drawn and signed by them alone, for goods intrusted to them for transportation, are to be construed most strongly against them. If a common carrier, who undertakes to transport goods, for hire, from one place to another, and deliver to address, inserts a clause in a receipt signed by him alone, and given to the person intrusting him with the goods, stating that the carrier is "not to be responsible except as forwarder," this restrictive clause does not exempt the carrier from liability for loss of the goods, occasioned by the carelessness or negligence of the employees on a steamboat, owned and controlled by other parties than the carrier, but ordinarily used by him, in his business of carrier, as a means of transportation; such managers and employees are, in legal contemplation, for the purposes of the transportation of such goods, the agents and servants of the carrier. A receipt executed as above stated will not be construed as exempting the car-

²⁴ *Marshall v. Steamboat Philadelphia*, 32 Mo. 256.

²⁵ *Marshall v. The American Express Co.*, 7 Wis. 1.

²⁶ *Hooper v. Wells, Fargo, & Co.*, 27 Cal. 11.

rier from liability for loss occasioned by negligence in the agencies he employs, unless the intention to thus exonerate him is expressed in plain and unequivocal terms.²⁷

²⁷ This case has been questioned, but the proposition that such a restrictive clause, to the extent that the express company are only to be responsible as "forwarders," could not be construed as exempting the carrier from responsibility for loss caused by the negligence of the employees on a steamboat, owned and controlled by other parties than the carrier, but ordinarily used by him, in his business of carrier, as a means of transportation; and that in such case the employees of the steamboat are, in legal contemplation, the servants of the carrier, seems not susceptible of much question. The clause of exemption from responsibility, that the carriers shall not be "responsible except as forwarders," in its precise terms does not seem to have any just application to that portion of the transportation which was performed under the express supervision of their own agent. It would seem to have been inserted with reference to such cases as required transportation beyond the defendants' line. They were certainly not "forwarders" upon their own route and while the goods were in charge of their own servants, as was the fact when the loss occurred in this case. We think, therefore, that the court might, with perfect propriety, have held that the words had no application to transportation upon their own line, and consequently did not touch the present case.

But if they were susceptible of the application given them by the court, in favor of the carrier, as intended to reduce his responsibility as an insurer to that of an ordinary agent, general or special, which seems to us a far too liberal construction of the carrier's own words, by which he now claims to secure his own exemption from the extreme common-law responsibility, when other terms were far more natural and more effective for any such purpose; but, admitting this construction is allowable, still we think it cannot relieve the defendants, since it leaves them still responsible for ordinary care, diligence, and skill, in the conduct of the business of transportation. And this must extend, not only to themselves and their particular servants, but to all the agencies employed by them, both animate and inanimate. And although the owners might have looked directly to these servants of the carrier, and brought their action against the steamboat company, as in the case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344;

Still, they were not obliged to do so. This company were employed by the carriers, as their servants, and they are responsible for their faithfulness and good conduct, as such, and there is nothing in the contract to throw this upon the owner of the goods, or to shift his claim for indemnity upon them. It is at the election of the owners whether they will pass over their immediate employees and call upon the general carrier for indemnity. The English courts, as we have before shown, *ante*, § 45 and notes, will not allow the owner of the goods to maintain an action against any carrier connected with the transportation, except those with whom his immediate contract is made. But the American rule, as before stated, gives the owner an election to call upon any one connected with the transportation for indemnity, to the extent of the loss or damage sustained through his particular default. And we think this the more just and reasonable rule.

§ 57. But there are other cases where a similar restrictive clause, that the carrier "shall only be held responsible as forwarders," has received a similar construction to the one already stated in the case from California, as having the effect of securing the carrier from all liability except for positive negligence and thus imposing upon the owner of

So that upon every ground, it would seem, the owners of the goods might claim to recover, for a loss sustained through the want of ordinary care in those independent carriers employed by the express company with whom they contracted, since, if the restriction was not properly applicable to such independent carriers, they would be responsible to the full extent, as insurers, and the express company having assumed to overlook the transportation, personally, and to accept the whole price of transportation themselves, must be responsible to the owners for all defaults of independent carriers employed by them, and will in turn have a remedy over against such carriers. This may imply that the ultimate carriers will, in some cases, be liable to actions from more than one party for the same default. But this is true in all cases where business is transacted through the agency of others. The action may always be brought as before stated in the name of the agent, in whose name the contract is made, or of the principal. And in the latter case the defendant will have the same right of set-off, and other defenses, as if the suit were brought in the name of the agent with whom he contracted. *Lapham v. Green*, 9 Vt. 407. And if, on the other hand, the ultimate carriers are regarded as coming within the fair construction of the restrictive clause in the receipt, then it will not avail the defendants, for the reason that it cannot properly be so construed as to cover defaults resulting from neglect of duty, in regard to proper care. *New Jersey Steam Navigation Co. v. Merchants' Bank*, *supra*.

The same remark applied to the former part of the case is true of the proposition, that a restrictive clause in the bill of lading or receipt given by the carrier, will not be construed to exempt him from responsibility for loss occasioned by negligence in the agencies employed by him, unless such intention is very clearly expressed in such instrument; it comes short of the true rule of law upon the subject. The better opinion, we think now is, that no person, natural or corporate, shall be allowed to stipulate for exemption from responsibility for his own negligence, because that removes one of the most direct and effective motives for faithful conduct, and such a contract would, therefore, be against sound policy; it is equivalent to allowing one to contract for license to do an immoral or an unlawful act. The license is void, and revocable at any time, and the promised reward, being the price of an act *contra bonos mores*, is not enforceable in a court of justice. *Post*, ch. xiii., pl. 5; *McManus v. Lancashire Railw. Co.*, 2 H. & N. 693; s. c. 4 id. 327. In this latter hearing, before the Exchequer Chamber, the opinion of the Court of Exchequer was reversed, and all such contracts as professed to excuse the carrier for the neglect of duty by his servants, were held to be unreasonable and void under the English statute, 17 & 18 Vict. chap. 31, s. 7.

the goods the burden of proving such default of the carrier.²⁸

§ 58. There seems to be no question made in the recent American cases, that express carriers *prima facie* assume the responsibility of common carriers and are bound, ordinarily, to make personal delivery on arrival at the place of destination.²⁹ And where the package, being money, was received to be delivered at the bank, at the place of destination, and the carrier arrived after the bank was closed, and carried the money twice to the house of the cashier and not finding him, brought it back to the owner and offered it to him, but he refusing to accept it, the carrier declined to be further responsible for it, it was held he could not thus excuse himself from his undertaking, after having entered upon its performance, but must deliver the money at the bank in proper business hours and into the hand of the proper receiving officer.³⁰

§ 59. Where goods are sent by carrier to be paid for on delivery, the consignee is entitled to a reasonable time in which to inspect the goods before he accepts them, and the carrier does not make himself responsible for the price by affording reasonable opportunity for such inspection, even where he places them in the hands of the consignee, for that purpose, receiving from him the price, as a pledge for their return, if not accepted.³¹

§ 60. It seems to be the general sense of the profession, and the almost uniform course of the more recent decisions, that express, and other common carriers may limit and restrict their responsibility as insurers, by general notices brought home to, and impliedly assented to by the owner of the goods, to any reasonable extent; but that this will not extend any protection to the carrier against

²⁸ *Kallman v. U. S. Express Co.*, 3 Kansas, 205.

²⁹ *Haslam v. Adams Express Co.*, 6 Bosw. 235.

³⁰ *Merwin v. Butler*, 17 Conn. 138.

³¹ *Lyons v. Hill*, 46 N. H. 49.

any default or misconduct either of himself or his servants.³² And unless it appears that the damage accrued from the excepted risks and without the fault of the carrier, he will be held responsible.³³ The limitations of the bill of lading will bind the shipper, as to the extent of the responsibility of the carrier.³⁴ So also will a receipt given for the goods, at the time of delivery.³⁵ But evidence of a special oral contract at the time of the shipment, the bill of lading not being delivered till some time after, will control the carrier's responsibility.³⁶ But in Georgia it seems to be considered that the common-law responsibility of carriers can only be controlled by express contracts, of which provisions in their receipts are not sufficient evidence.³⁷

³² *Baltimore & Ohio Railw. v. Rathbone*, 1 West Va. 87.

³³ *Czech v. General Steam Nav. Co.*, Law Rep. 3 C. P. 14; *Newborn v. Just*, 2 C. & P. 76; *American Express Co. v. Sands*, 55 Penn. St. 140.

³⁴ *Farnham v. Camden & Amboy Railw.* 55 Penn. St. 53.

³⁵ *Bowman v. Am. Express Co.*, 21 Wis. 152. But see *Prentice v. Decker*, 49 Barb. 21; *Limburger v. Westcott*, id. 283.

³⁶ *Detroit & Milw. Railw. v. Adams*, 15 Mich. 458.

³⁷ *Southern Express Co. v. Newby*, 36 Ga. 635; *Same v. Barnes*, id. 532.

CHAPTER V.

RIGHTS AND DUTIES OF EXPRESS CARRIERS.

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| <p>61. <i>Liable for not making delivery to consignee.</i></p> <p>§ 62. <i>Contract of company with local carriers only temporary.</i></p> <p>§ 63. <i>Cannot charge in proportion to value of parcels, and restrict their liability.</i></p> <p>§ 64. <i>Not responsible as common carriers in some cases.</i></p> <p>§ 65. <i>Company, where statute prohibits discrimination, cannot charge express carriers higher than others, or give one such carrier exclusive privileges.</i></p> | <p>§ 66. <i>Responsible for not causing proper protest of bill.</i></p> <p>§ 67. <i>Constructive grounds of limiting responsibility to his own route.</i></p> <p>§ 68. <i>English statute requires packed parcels to be carried by weight.</i></p> <p>§ 69. <i>Temporary residents entitled to the protection of the Massachusetts statute, as to married women.</i></p> <p>§ 70. <i>The party failing to carry forward proper directions, responsible for consequent loss.</i></p> |
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§ 61. THIS is a mode of transportation, as already stated, which has come in practice very much, since the general use of railways for transportation. It seems more necessary on account of the rapidity of movement upon such roads, and also the mode in which business is generally transacted by railway companies, of only delivering at their stations. Express companies, and agents, as far as we know, receive parcels at their offices, not only at their principal *termini* in the large towns and cities, but at local offices along the line of their routes, and even send their wagons about the cities and towns to gather up parcels when notified to do so, and adopt a similar course in delivering out parcels at the doors of the dwellings, or places of business, of the consignees. This mode of transacting the business of expresses seems to come in the place of the general carrying business of parcels;¹ or, according

¹ In a case in South Carolina, *Stadhecker v. Combs*, 9 Rich. 193, which was a suit against an express company for the value of a trunk lost by them, it is said :

to the definition of the English Carriers' Act, of things of great value in small compass. And there can be no ques-

"A strict application of the law of common carriers is necessary for the protection of the large amount of property committed to the hands of strangers for transportation to distant points, and certainly, from such an application, express companies have no claim to exemption." And in *Sweet v. Barney*, 24 Barb. 533, it was held, that the party to whom money was sent by express might direct the place and mode of delivery. Hence, a bank in the city, to whom money is sent by bankers in the country by express, being considered the owner of the money, may authorize the same to be delivered at the office of the express company, or at any other place in the city, to any person it may select; and the express company, by making such a delivery, will be relieved of their responsibility, whether it be that of common carrier or forwarder. All the express company is bound to do in such cases is to make such a delivery as will charge the consignee. In the absence of all special provision, in such cases, it is the duty of the express agent to deliver the money at the bank, to the proper officer. And where it is the practice of such companies to deliver packages, according to their address, it will be presumed that they assume to deliver all packages committed to their custody in that mode. And in such case the only delivery which will charge the bank or release the express, is a delivery according to the address of the parcel, at the bank, to the proper officer.

But where the express delivers the money to a porter, at their office, who had usually been employed by the bank to receive such packages for them, it is not sufficient to discharge the express, unless such delivery was authorized by the bank; and it is incumbent upon the express to prove such authority in its own discharge. This proof may be direct and express, or implied from the acts of the porter, such as receiving money for the bank on other occasions at the express office, sent to it in a similar way and a similar address with the one in question, and with the knowledge and assent of the bank, provided the testimony is sufficient to satisfy the triers of the fact, that the bank authorized the porter to receive the money on their behalf, or that, from the manner in which they allowed him to conduct business on their behalf, they were bound to suppose others might understand that he was authorized to so act on their behalf, and that the express company did so understand it.

The Am. Railw. Times, Feb. 1858, speaks of a newspaper report of a recent decision in Wisconsin, wherein it was held that a tender of money carried by express, at the bank, at any time, although not in banking hours, will discharge the company from their responsibility as common carriers, and from all liability, the money having been stolen from their safe during the following night, without their fault. There is probably some misapprehension in regard to the point upon which the case was decided; for a tender at a bank, out of known and recognized banking hours, is obviously no tender at all. One might as well make a tender to a merchant at midnight, after the store was closed. But it has been held that a tender after sundown, if made personally to the party, at his place of business, is good. *Startup v. Macdonald*, 6 M. & G. 593. So, too, a tender at a bank, while open and the officers in, might be good, although after banking hours. See *Marshall v. American Ex. Co.*, 7 Wis. 1.

tion that, upon general principles, these expresses are liable as common carriers, and liable, according to the course of their business, and the expectation thereby created in the mind of their employers, for all parcels received into their wagons, and bound to make personal delivery to the consignees or to their agents, at their places of business, or, in default of having such, at their residences. And since the establishment of such expresses, it will be presumed that one who expects a parcel to be delivered personally, or notice given to the consignee, will intrust it only to the express upon the route, and his giving it in charge of the general freight agent of the railway is equivalent to an express contract, almost, that the company shall only be bound to such a delivery as is according to their general course in this department of their business. For, by delivering the parcel to the express, the owner not only secures the responsibility of the express company or agent, but also of the railway company, unless they have stipulated with the express for some exemption from their ordinary common-law liability as carriers, in the transaction of the business of the express, and this is made known to, or might on inquiry be learned by, the owner of goods so sent. These propositions result from the elementary principles of the law of bailment, and are recognized by the best-considered cases.² And excuse must result from some agency beyond the control of the agents and employees of the carrier. And therefore, as before stated, a railway company is liable for loss resulting from the delay of transportation caused by the refusal of the company's engineers to work, although such conduct could not have been foreseen, and the places of such engineers supplied in time to save the loss.³ Under a written contract, by which the owners of a steamboat bound themselves as common carriers to deliver

² *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 344.

³ *Blackstock v. N. Y. & Erie Railw.*, 20 N. Y. 48; *ante*, § 25.

certain goods at a specified point, the loss of the goods by fire after having been deposited in a warehouse at the highest point to which, on account of the low stage of the water, the boat could ascend the river, does not excuse the defendant's failure to deliver the goods at the specified place.⁴ And carriers of cotton, which was stored on the forecastle with the sacking torn and the cotton exposed, and there set on fire by carrying torch-lights upon the boat, according to the usual custom,⁵ were held liable for its loss. Indeed, in all cases where it is shown that goods are put in charge of a common carrier, in apparently good condition, and are found subsequently in a damaged state, the carrier is *prima facie* responsible for the loss.⁶ In an important case which recently occurred,⁷ where a package of money was delivered to an express company to carry into another State, for the consignee to whom it was to be delivered, it was held, that where the company had been accustomed to enter all packages upon a delivery book, and to take a receipt upon delivery, the fact that no such entry has been made upon the delivery book tends to rebut any presumption of delivery; that express companies are responsible as common carriers, and are ordinarily to be regarded as undertaking to make delivery to the consignee, and that they are *prima facie* liable unless such delivery is made, except where the business is too limited to justify keeping a messenger to perform such act of delivery, and in such cases that prompt notice should be given to the consignee of the arrival of the package; that the undertaking of such express company ordinarily implies an actual delivery to the proper person at his place of business; and in no other way can the company discharge itself of responsibility except by proving performance of

⁴ Cox v. Peterson, 30 Ala. 608.

⁵ Hibler v. McCartney, 31 Ala. 502.

⁶ Fenn v. Timpson, 4 E. D. Smith, 276; Hall v. Cheney, 36 N. H. 26.

⁷ Baldwin v. The American Express Co., 23 Ill. 197.

its undertaking, or that it has been prevented by the act of God or of the public enemy. And in the same case in a later volume,⁸ it was held that the company will be responsible for the loss, when it appears that it occurred from not keeping the key of the company's safe securely, whereby access was obtained by one who stole the key and the money by thus gaining admission to the safe. And that where it appears that the company had delivered packages before entry upon the delivery book, it must nevertheless be shown that the company had in fact actually delivered the parcel in question, or at least offered to deliver it, at the proper time and place, in order to relieve itself from responsibility as common carriers.

§ 62. It was held, in a recent case,⁹ in the English Court of Exchequer, that a contract between a railway company and an individual, that he should, for a twelvemonth, carry all grain, merchandise, etc., between certain points to and from the railway, at a given price, he providing wagons, horses, drivers, tarpaulins, and other plant necessary for the cartage, and agreeing to be responsible for all money due to the company for the carriage of goods carted by him for such persons as had not ledger accounts with the company, and to observe all the regulations of the company, might be terminated at any time by the company, even after such person had provided himself with the requisite furniture to carry the contract into effect, and entered on its performance; the company having, in the mean time, made an arrangement with another railway, by which cartage between these points became unnecessary.

§ 63. Where an express company restricted their liability

⁸ *American Express Company v. Baldwin*, 26 Ill. 504.

⁹ *Burton v. The Great N. Railway*, 9 Exch., 507; s. c., 25 Eng. L. & Eq. 478. But the verdict in this case, at the trial before *Martin*, B., was for the plaintiff, on the ground that the company impliedly bound themselves not to do anything, during the term the contract was to run, to deprive the plaintiff of the ordinary cartage between those points. And it seems to us the decision of Baron *Martin* is quite as satisfactory as that of the full bench.

in the receipt given for a package of bonds, with coupons attached, valued at \$40,000, and charged for carrying a very high rate in proportion to the size or weight of the package, even beyond the usual rate of insurance, it appearing that no extraordinary care was bestowed on parcels of high value, it was held that there was no reason for enhancing the charge for transportation in proportion to the value of the articles carried, and that the charge was exorbitant and unreasonable.¹⁰

§ 64. Express carriers who take parcels marked for distant points, and where they have no agents, have sometimes been held not responsible, as common carriers, to carry safely to the end of the route, and there deliver safely, but only for ordinary care as forwarders;¹¹ but this is not the present most approved rule on the subject. They may however restrict their liability by express contract.¹¹

§ 65. Where the statute requires a railway company to carry for all who apply, and upon equal terms, they have no right to impose increased prices upon express carriers who send freight by the company's trains, in aggregate quantities, made up of small parcels, directed to different persons.¹² Nor can railways impose their own terms for freight by including an extra and unreasonable charge for the receipt and delivery of freight and parcels, about the towns adjoining the stations.¹² So, too, a contract giving

¹⁰ *Holford v. Adams*, 2 Duer, 471. But where the receipt given by the Express Company contained a condition that "the holder shall not demand above the sum of fifty dollars, the sum at which the article is hereby valued, unless otherwise herein expressed, or unless specially insured and so specified in the receipt," where no insurance was made and there was nothing to vary the clause in the receipt, it was held the carriers were liable only to the extent of fifty dollars. *Newbergher v. Howard & Co.'s Express*, Legal Int. June 16, 1866.

¹¹ *Hersfield v. Adams*, 19 Barb. 577. Where it is held that express agents who transport parcels by other lines of common carriers, are not themselves common carriers, but only forwarders, and liable as such. But see *Read v. Spaulding*, 5 Bosw. 395. See also *Place v. Union Ex. Co.*, 2 Hilton, 19, where the case first cited is disapproved.

¹² *Pickford v. Grand Junction Railw.*, 10 M. & W. 399.

the exclusive privilege to one express company of transportation in the passenger trains is illegal and void, being in contravention of the statute requiring equal privileges and equal charges to all.¹³

§ 66. Where an express company received, for collection for a reward, a bill of exchange drawn in one State and payable in another, and which therefore required demand of the acceptor and protest on the day of payment, in order to charge the drawer or indorsers, but which the express agent caused to be made one day before the maturity of the bill, whereby the other parties were released, the acceptor being insolvent, it was held that the express company thereby became responsible to the holder of the bill for the amount.¹⁴

§ 67. It seems to be a well-recognized rule in the American courts, applicable to express carriers, as well as other common carriers, that the receipt of a parcel of any kind destined to a remote point, and which, in the ordinary course of the transaction of the business, the first carrier will have to intrust to others with whom he holds no special business relations, that unless the first carrier makes some special and express undertaking he will only be responsible as a common carrier to the termination of his own route in the direction of the transportation; and this rule will exonerate a carrier who gives his receipt for a bill of goods, for collection, from a person beyond his route, in the absence of any special contract for

¹³ *Sandford v. The C. W. & E. Railw. Co.*, 24 Penn. St. 378. And where an express company carried on its business within the State of Indiana, without complying with the statute of that State regulating such companies (March 5, 1855), it was held that their business thereby became illegal, and that the company could not maintain an action upon a bond given with surety by one of their servants or agents for faithful service and just account of all receipts. *Daniels v. Barney*, 22 Ind. 207. But it was here held, that where money had been paid by the party to an illegal transaction to an agent of the principal, the latter might recover the same, as the implied obligation of the agent to pay the money to his principal did not rest upon the illegal transaction.

¹⁴ *American Express Co. v. Haire*, 21 Ind. 4.

the faithfulness of other carriers to whom, in the ordinary course of the business, the bill was intrusted, and who failed to pay over the amount collected.¹⁵

§ 68. The English statute requires railways to carry parcels directed to one consignee according to the gross weight, although they have a label showing several destinations after delivery.¹⁶

¹⁵ *Lowell Wire F. Co. v. Sargent*, 8 Allen, 189.

¹⁶ *Baxendale v. Southwestern Railw.*, 12 Jur. (N. S.) 274; 4 H. & C. 130; s. c., Law Rep. 1 Exch. 137. The case of *Place v. The Union Express Co.*, 2 Hilton, 19, presents many interesting points of law, which we give in detail.

A common carrier is one who for a reward undertakes to carry goods for persons generally, as a public employment. "It is the receipt of, or the right to the freight or charge for the carriage of goods, together with the public nature of their employment, that makes them common carriers."

The Union Express Company received certain boxes of fruit, which they agreed by a receipt in writing to deliver at the depot at M. within twelve days, upon payment of freight, stipulating against responsibility for accidents and casualties beyond their control, and particularly that their guaranty of special despatch should not cover cases of unavoidable or extraordinary casualty. They also stipulated that fruit should be at the owner's risk of transportation, loading and unloading; that they would not be liable for injury to any articles of freight during the course of transportation, occasioned by the weather or accidental delays, or natural tendency to decay; that they would pay five cents per 100 lbs. for each day the fruit was delayed beyond contract time, and that all claims for damages, &c., should be presented for settlement at their office in N. Y. They shipped the fruit so received to M., the place of its destination, via N. Y. C. R. R. & G. W. R. R., with which roads alone they had any arrangement for transportation. For nearly two months prior to their taking the fruit in question the G. W. R. R. Co. had been unable to receive freight as fast as the N. Y. C. R. R. delivered it, and in consequence there was a great accumulation of it, and a delay of at least ten days on the average in the transportation. The fruit in question was in consequence delayed over twenty days upon the route, and was nearly ruined by decay when it reached M. There was another road by which the fruit might have been sent, but the Union Express Co. had no arrangements for transportation with that road. In the action against the Union Express Company to recover the damages for the injury to the fruit, held, —

1. That the defendants' agreement to deliver the freight received according to the conditions of their tariff, classification, and rules, rendered them liable as common carriers for the safe carriage and delivery of the goods, and subjected them to the liability incident to that employment, except so far as it was limited by express stipulation.

2. That the proof by the consignee that he did not receive the goods within the time specified, coupled with evidence that a part of them did not arrive, was sufficient evidence of the failure of the defendants to deliver at the depot at M., to

§ 69. Under the Massachusetts statute for the protection of the property of married women, it was held, that where a man and woman came into the Commonwealth for the purpose of being married, and were married, and a few days after the woman, while residing at an inn, sent to a broker in the State from which she came and with whom she had deposited money or property earned by her before the marriage, and directed him to send her a sum of money by an expressman, which he did, with instructions to deliver it to her upon her own personal receipt; but the

throw on them the onus of showing when the fruit did arrive at the depot. It was a matter peculiarly within their knowledge, and slight evidence on the part of the plaintiff was therefore sufficient to throw on them the burden of proof.

3. That the defendants were liable for the decay of the fruit. The clause providing that they should not be liable for natural decay must be understood as applying to decay which the fruit might be subject to during the prescribed time within which the defendants undertook to deliver it at M., not to such as was occasioned by the defendants' delay.

4. That the clause providing that the defendants should pay five cents per 100 lbs. for every day the goods were delayed beyond the time fixed by the contract for delivery did not limit the liability of the defendants thereto. They were liable in that amount whether the plaintiff suffered any loss by the delay or not, and were also liable for any actual damage to the fruit occasioned by such delay. That clause in the agreement applied only to cases where the property was delivered uninjured, but after the contract time.

5. That it was not necessary for the plaintiff, as a condition precedent to the defendants' liability, to present the claim for settlement to them at their office in New York. In order to avail themselves of any defense arising under the clause of the contract providing for such demand, it was necessary for them to plead a readiness to pay the amount of damages at such place, and follow it up by a tender of the amount in court.

6. That the facts shown as being the cause of delay did not prove that it was the result of an accident or casualty beyond the defendants' control. It was their duty to have known the conditions and possibilities of transportation upon the routes over which they were accustomed to transport their goods, before entering into a contract to deliver within a specified number of days; especially so when the cause of the detention was a disarrangement of the roads and a want of facilities upon one of the roads, not of a sudden development or of a temporary duration, but one that had existed for some time prior to their making the contract.

7. Where there is a special contract to carry within a *prescribed* time, the carrier is held to a rigid performance of it, and is not excused, even by inevitable necessity, unless he has provided against it by positive stipulation.

expressman delivered it to the husband, who absconded with it; that the woman might maintain an action in her own name against the expressman for the recovery of the money, if she had not given her husband authority to receive the money, or represented him as her agent.¹⁷

§ 70. And where goods are sent with instructions to deliver on payment of the price, but are in fact delivered without such payment, and the purchaser becomes insolvent before payment, the party in fault in not forwarding the instructions or not observing them is responsible for the loss.¹⁸

¹⁷ *Read v. Earle*, 12 Gray, 423.

¹⁸ *Hutchins v. Ladd*, 16 Mich. 493. But see *Gordon v. Ward*, 16 Mich. 360.

CHAPTER VI.

RESPONSIBILITY FOR BAGGAGE OF PASSENGERS.

§ 71. <i>Liabie as common carriers for baggage.</i>	§ 74. <i>Company not liable unless baggage given in charge to their servants.</i>
§ 72. <i>Liability where different companies form one line.</i>	§ 75. <i>Liability results from duty, and not from contract.</i>
§ 73. <i>Company liable for actual delivery to the owner.</i>	§ 76. <i>Carrier responsible for baggage if servants accept it.</i>

§ 71. It is an elementary principle in the law, that the carriers of passengers are liable as common carriers for their ordinary baggage, or, as it is more commonly called in the English books, luggage.¹ And it is considered that, as railways have made their checks evidence in regard to the delivery of baggage, the possession of such check by a passenger is evidence against the company of the receipt of the baggage. In one case, the court say, "It stands in the place of a bill of lading."² And it has been considered

¹ Brooke v. Pickwick, 4 Bing. 218; Hawkins v. Hoffman, 6 Hill (N. Y.), 586; Bennett v. Dutton, 10 N. H. 481; Powell v. Myers, 26 Wend. 591; Dill v. Railw. Co., 7 Rich. 158, 162; C. & A. R. & T. Co. v. Burke, 13 Wend. 611; Robinson v. Dunmore, 2 Bos. & P. 416; Clarke v. Gray, 6 East, 564; s. c. 4 Esp. 177.

² Dill v. Railw. Co., 7 Rich. 158. And where the carrier gave public notice that he would not be liable for baggage of passengers, unless checked, this will not, if it have any effect, excuse him where the passenger delivered his baggage on board the carrier's steamboat to a proper agent, but was refused a check, because the person who gave the checks was not present. Freeman v. Newton, 3 E. D. Smith, 246. But in Wilton v. Atlantic R. M. S. Co., 10 C. B. (N. S.) 453, where the plaintiff took passage on board the defendants' ship on the terms of a ticket which stipulated the company should not be responsible for baggage, goods or other property, unless a bill of lading were signed therefor, and that each first-class passenger should be allowed twenty cubic feet of baggage free, excepting certain articles, and the ship was lost, together with the plaintiff's baggage, through

that the admissions of the conductor, baggage-master, and station agent, as to the manner of the loss, made in reply to inquiries by the owner the next morning after the loss, are admissible as evidence against the company.³ And proof that the baggage could not be found when inquired for by the passenger raises a presumption of negligence on the part of the carrier.⁴

§ 72. And where different railways, forming a continuous line, run their cars over the whole line, and sell tickets for the whole route, and check baggage through, an action lies against either company for the loss of baggage.⁵ And it is the duty of railway companies to keep agents in readiness to receive baggage, and if they allow the agents of other companies to receive its baggage at their stations, or their own agents to receive at the stations of other companies, they are bound by their acts.⁶

the negligence of the captain, the company were held not responsible. The plaintiff's luggage was received on board the ship, consisting of several trunks, without any questions being asked about it; the plaintiff neither declaring the contents nor taking a bill of lading, nor being required by any person to do so. The company were excused on the ground that no bill of lading was taken.

³ *Morse v. Connecticut River Railw.*, 6 Gray, 450. But the statements of an engineer, made some days after an injury by his engine, in regard to the occurrence, are not evidence against the company. *Robinson v. Fitchburg & Wor. Railw.*, 7 Gray, 92. And declarations of the president of the company that he thought the company would pay plaintiff something, on plaintiff's application to the company for damages, and their vote to lay it on the table, are not evidence. *ib.* But the fact that the consignee of goods made inquiry for them at the proper office, and could not obtain them after they should have arrived, is evidence of the loss. *Ingledew v. Northern Railw.*, 7 Gray, 86.

⁴ *Van Horn v. Kermit*, 4 E. D. Smith, 453. See also *Garvey v. C. & A. Railw.*, 1 Hilton, 280.

⁵ *Hart v. Rensselaer and Sar. Railw.*, 4 Seld. 37. The person selling the tickets and receiving the baggage is here treated as the agent of each company. This suit is against the last company on the route. And there was no evidence in the case where the loss occurred. *Straiton v. N. Y. & N. H. Railw.*, 2 E. D. Smith, 184. The first company is liable for the entire route, if the baggage is lost. *Cary v. Cleveland & Toledo Railw.*, 29 Barb. 35. And in a late English case it was held that the first company was the only one liable to be sued by the passenger, even where the loss occurred upon the line of one of the other companies. *Mytten v. Midland Railw. Co.*, 4 H. & N. 615.

⁶ *Jordan v. The Fall River Railw.*, 5 Cush. 69.

§ 73. And where the company employ porters, at their stations, to convey passengers' baggage to the carriages in which the passengers leave the stations of the company, their liability continues till it is so delivered, and it makes no difference whether the baggage be placed in the same carriage with the passenger, or in the baggage car.⁷ But if the passenger choose to take the exclusive control of his own baggage, as a purse, or coat, cane, or umbrella, for instance, the company are not ordinarily liable.⁸ But the liability having once attached, by a delivery to the company's servant, they remain liable until a full and unequivocal redelivery to the owner, and ordinarily to the end of the route.⁹ A delivery upon a forged order is no excuse.¹⁰ A question sometimes arises in regard to the responsibility of passenger carriers for the baggage of passengers after its

⁷ *Richards v. The London, Brighton, & South Coast Railw.*, 7 C. B. 839. In a late case, *Butcher v. London & S. W. Railw.*, 16 C. B. 13; s. c., 29 Eng. L. & Eq. 347, the plaintiff was a passenger from F. to W., bringing with him, as luggage, a small carpet bag, which was placed in the carriage he rode in. On arrival of the train at W., the plaintiff got out upon the platform with the bag in his hand, and it was taken from him by a railway porter to be placed in one of the cabs which were standing in the station. The plaintiff never saw his bag again, and the porter could not find it. It was proved to be the practice of the company to have their porters assist in carrying the passengers' luggage to the cabs in the station. Held, that there was evidence of the company having contracted to deliver the plaintiff's bag to the cab, and of their not having performed the contract, and that, whether the plaintiff had accepted a delivery upon the platform in lieu of a delivery to the cab, was a question of fact for the jury.

⁸ *Tower v. Utica & Sch. Railw.*, 7 Hill (N. Y.), 47. *Wilde, J.*, in *Richards v. London, Brighton, & South Coast Railw.*, 7 C. B. 839. But if the company have charge of the things in any manner, they are liable, notwithstanding the owner may also have an eye upon them. *Robinson v. Dunmore*, 2 Bos. & Pul. 416, *Chambers, J.*; *Cohen v. Frost*, 2 Duer, 335. Carriers of passengers, as steamboat proprietors, are not liable for the loss of wearing apparel which passengers carry about their persons, and do not deliver to the officers of the boat as baggage for safe-keeping. *Steamboat Cr. Palace v. Vanderpool*, 16 B. Monr. 302, 308.

⁹ *Camden & Amboy Railw. Co. v. Belknap*, 21 Wend. 354.

¹⁰ *Powell v. Myers*, 26 Wend. 591. If baggage be not called for in a reasonable time the liability of the company as carriers ceases, and they are holden only for ordinary care, as bailees for hire. *Post*, ch. x.; *Van Horn v. Kermit*, 4 E. D. Smith, 453.

arrival at the point of destination, but before its delivery to the owner. We apprehend, that in analogy to other classes of common carriers, the responsibility must continue until the owner has had reasonable time and opportunity to come and take it away.¹¹ After that the responsibility as carrier ceases, and the carrier becomes a mere warehouseman, bound to exercise the same care that prudent men ordinarily do in keeping their own goods of similar kind and value. In one case,¹² where a railway passenger, on arriving at his place of destination, took his baggage into his own exclusive control, but afterwards, for his own convenience, handed it to the baggage-master at the station, to be kept until sent for, it was held the company were only liable for gross negligence, the bailment being without reward. That would unquestionably be the rule, where one leaves baggage at a station, who was not a passenger and did not purpose to become one. Indeed, the company could hardly become responsible at all in such a case, since their agents have no authority to receive baggage on their account, except as incidental to passenger transportation. But, so long as the custody of the baggage is incident either to a past or prospective transportation of the passenger, the company must be regarded, at the least, as bailees for hire, the fare paid extending both to the transportation of the passenger and his baggage, and the storage of the latter for a reasonable time afterwards, so as to meet any ordinary exigency of travel. But we should consider the case just referred to as standing upon the ground that the duty of transportation, with all its incidents, had become fully terminated, and, if so, it seems to us questionable how far the baggage-master had any authority on the part of the company to receive baggage merely to keep. It was clearly responsible only as a warehouseman. In a somewhat recent case¹³ in Vermont, this question is

¹¹ *Post*, ch. x., pl. 8, 18.

¹² *Minor v. Chicago & N. W. Railw.*, 19 Wisc. 40.

¹³ *Quimit v. Henshaw*, 35 Vt. 605.

learnedly and judiciously discussed by *Aldis*, J., and the following propositions declared. A passenger arriving by cars at a railway station is justified in regarding the person who handles and takes charge of the baggage as the agent of the railway company; and notice to such person is notice to the company. It is the duty of a railway company, in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery, until the owner, in the exercise of due diligence, can call for and receive it; and it is the owner's duty to call for and remove it within a reasonable time. If he does not so call for and receive it, it is the company's duty to put it into their baggage-room and keep it for him, being liable only as warehousemen. And the reasonable time within which the owner must call for it is directly upon its arrival, making reasonable allowance for delay caused by the crowded state of the depot at that time; and the lateness of the hour makes no difference, if the baggage be put upon the platform. Whether a bed, pillows, bolster, and bed quilts, belonging to a poor man, who is moving with his family, carried along with him by a railroad train, and packed in his trunk or box containing his clothing, are baggage or not, is a question to be decided by the jury, taking into consideration the peculiar circumstances, and the value, quality, and use of the articles. In *Van Toll v. South Eastern Railw.*,¹⁴ it was considered that a passenger, who left her bag in the cloak-room of a station of the company, on her arrival, taking a ticket for the same and paying 2d., there being printed on the ticket a notice that the company would not be responsible for articles so left, exceeding the value of £10, must be regarded as *prima facie* assenting to such restriction, and, therefore, that the company, in this instance, was not responsible beyond that amount for the loss

¹⁴ 12 C. B. (N. S.) 75; s. c. 8 Jur. (N. S.) 1213. See also *Curtis v. Avon, etc. Railw.*, 49 Barb. 148.

of the contents of the bag by reason of delivering it to the wrong person. The obligation is the same in regard to baggage, where it is in excess of the weight allowed, and is paid for extra.¹⁵ When a passenger did not call for his trunk on arriving at the termination of his route, but left it overnight, without any arrangement, and it was destroyed before morning by the burning of the station, it was held the company were not responsible.¹⁶

§ 74. But where a passenger took passage upon one railway for B., at which point he intended to take passage upon another railway, whose terminus was about one hundred yards distant from the terminus of the first railway, there being an open, uncovered space between the two stations, and no connection in business between the companies, but a practice appears to have been conceded for the first company to carry luggage to the station of the other company, the porter obtained the plaintiff's portmanteau from the platform, where it had been deposited at the end of the first line, and placed it with other luggage on a truck, for the purpose of taking it across to the station of the other railway. The plaintiff testified, at the trial before the county court, that he saw the porter immediately after, with the truck, enter the station of the latter railway, and go to the place where luggage was put upon departing trains, but did not see his portmanteau, to recognize it, after it was first put upon the truck. He obtained his ticket, and asked the guard if his portmanteau was in the luggage van, and the guard told him to take his seat in the train, as it was about to move off, and to inquire for his portmanteau at the end of his route, which he did, but failed to find it. This suit was brought against the first company for not delivering the portmanteau either to the plaintiff or to the second railway, and the county court gave judgment against them upon the foregoing evidence. But it was held, on appeal

¹⁵ *Glasco v. N. Y. Central Railw.*, 36 Barb. 557.

¹⁶ *Roth v. Buffalo and State Line Railw.*, 34 N. Y. 548.

to the Common Pleas, that the plaintiff must give preponderating evidence of the non-delivery; and the mere fact of its non-arrival at its ultimate destination on the second railway is not sufficient, nor was the above evidence more consistent with the non-delivery than the delivery, and the judgment of the county court was reversed.¹⁷ But where an emigrant passenger, on a voyage from Liverpool to New York, took the exclusive possession of his trunk, taking it into the steerage, placing it under his bed, and fastening it to his berth by ropes, and during the voyage it was stolen, it was held that the owners of the ship were not liable.¹⁸

¹⁷ In this case the evidence all tended certainly to show a delivery to the second company, and therefore there was no testimony tending to prove the fact upon which the case is made to turn in the County Court. The decision in this case, therefore, seems consistent with those cases where the Court of Error has refused to reverse the judgment of the inferior courts, depending in any degree upon the determination of a disputed fact by the court rendering the judgment, where any testimony tends to support the judgment below. *East Ang. Railw. v. Lythgoe*, 10 C. B. 726; s. c. 2 Eng. L. & Eq. 331; *Cawley v. Furnell*, 12 C. B. 291; s. c. 6 Eng. L. & Eq. 397; *Cuthbertson v. Parsons*, 12 C. B. 304; s. c. 10 Eng. L. & Eq. 521.

In *Semler v. Comm. of Emigration*, 1 Hilton, 244, S., an emigrant arriving in New York, was, under the rules of the Commissioners of Emigration, placed on board a barge with the baggage, for the purpose of being landed. The barge belonged to and was in the custody of certain railroad companies, who had ticket offices in Castle Garden, the premises of the Commissioners of Emigration. Upon landing, the baggage was transferred to the wharf by the employees of the railroad companies, in whose charge it was left for the purpose of being weighed and marked, while S. was required to enter Castle Garden in order to have his name registered, pursuant to the rules of the Commissioners. During S.'s absence for this purpose his baggage was lost. Held, that the Commissioners of Emigration were not liable therefor. The baggage was not in their charge, nor in charge of any one of their employees. The remedy of S., if any, was against the persons in charge of the baggage, or of their employers, the railroad companies.

¹⁸ *Cohen v. Frost*, 2 Duer, 335. In *Fisher v. Clisbee*, 12 Ill. 344, it was held, that passengers on board of a ferry-boat, in taking care of their own property, after it has once got into the boat, may be regarded as agents of the ferryman, who is still liable for the property as a common carrier. The common carrier of passengers, by receiving the baggage of a traveller, becomes immediately responsible for its safe delivery at the place of destination. *Woods v. Devin*, 13 Ill. 746. But see *White v. Winnisimmet Co.*, 7 Cush. 155, where a person suffered damage, in crossing a ferry, by not taking proper care of his team, and the company were held not liable as common carriers, unless the owner of the team surrendered its custody to the ferryman, or his servants. In the case of

In a very recent English case¹⁹ the question of the degree of exclusiveness of care which the passenger must

Wilson v. Hamilton, 4 Ohio (N. S.), 722, it was held, that a ferryman is a common carrier; but if the owner of animals intrusted to his care knows of any special cause of peril, he is bound to inform, and if the owner, or his agent, take upon himself the care of the property, he is not to be regarded as the agent of the carrier in so doing, and the carrier is not liable for any injury resulting from the want of care in the owner or his agent. Nor is the owner precluded from recovering because he did not do all that skill or prudence could have suggested. See *Richards v. Fuqua*, 28 Miss. 792.

The passenger not accompanying his baggage but going in an after train, will not excuse the carriers from their ordinary liability. *Logan v. Pontchartrain Railw.*, 11 Rob. (Louis.) 24.

But in *Wright v. Caldwell*, 3 Mich. 51, where the plaintiff, intending to take passage on defendants' steamboat, deposited his trunk on board the boat, in the usual place for baggage, but without notifying any one employed on the boat, or making known his intention to take passage, and while temporarily absent the boat left, and the trunk could not afterwards be found, it was held no such delivery as to charge the defendant as a common carrier.

And an offer to deliver freight, or passengers' baggage, made at a proper time, though declined, discharges the carrier from his liability, as such; and if the freight or baggage still remains in his custody, he is only liable as a bailee for ordinary care. *Young v. Smith*, 3 Dana, 91. This was the case of a large amount of specie, carried, by consent of the officers of a steamboat, by a passenger, to be deposited in bank in the city of New Orleans. The court held it not requisite to deliver the specie in banking hours, unless some special contract or established usage of the port to the effect were shown, but that an offer to deliver any time in business hours, reasonable reference being had to its safety, was sufficient. In the case of *Powell v. Mills*, 37 Miss. 691, it was held, that ferrymen are subject to all the responsibilities of common carriers, and that after property was put on board their boats, it was *primâ facie* in their charge, and they responsible for it. And it makes no difference that the owner is present, unless he consents to assume the exclusive charge of the property. The defendant was the keeper of a public ferry, and had agreed with the plaintiff for hire to transport his stage-coach and horses across the river, without making any contract to change his common-law liability as a common carrier. The plaintiff's coach and horses were driven into the ferry-boat by their driver, who thereupon vacated his seat, hitched the lines, and went to the front of the horses, and commenced giving them water dipped from the river in a bucket. Whilst thus engaged, one of the horses became restive, and before the boat reached the landing the team ran out of the boat into the river, the driver being carried with them in his efforts to stop them. Held, that the coach and horses were in the possession and custody of the ferryman, and not of the driver; and that the defendants were responsible for the damages thus sustained by the plaintiffs.

¹⁹ *Le Conteur v. London & Southwestern Railw.*, 12 Jur. (N. S.) 266; L. R., 1 Q. B., 54; s. c., 6 B. & S. 961.

take of his baggage in order to exonerate the carrier, is considered. In this case the article was a chronometer, which the plaintiff, on a passage from Jersey to London, carried in his hand, tied up in a handkerchief, the rest of his luggage being stowed away by the carrier, apart from the plaintiff, in the usual mode. On the arrival of the plaintiff at the pier in Southampton, he left his luggage to be carried by the defendants, in the usual mode, to the railway station; but he carried the chronometer in his hand, tied up in the handkerchief, to the railway station, walking through certain streets a distance of half a mile. On arriving at the station the plaintiff went, "with the chronometer in his hand, up to one of the railway carriages going to London, and gave the chronometer to a porter of the defendants, and who then in the presence of the plaintiff placed it on the seat of the carriage. Both the porter and the plaintiff immediately after this left the platform together, the porter to attend to other duties, and the plaintiff to look after the rest of his luggage, which had not arrived from the custom-house. The plaintiff remained absent some ten or fifteen minutes; when he returned the chronometer was not to be found." The comments of Lord Ch. J. *Cockburn* seem so precisely what the rule of law should be, in such cases, that we insert them at length: "When the case was first opened I imagined that the facts were such as to lead to the necessary inference that the plaintiff had taken possession of the chronometer in question, withdrawing it from the custody of the company, and himself taking charge of it. My first impression, however, appears to have arisen from a too rapid view of the circumstances. What really took place appears to be this, — that by desire of the plaintiff a porter of the company placed this article in one of the carriages, on a particular seat, which was to be reserved for the plaintiff. I am far from saying that no case can arise, in which a passenger, having luggage which by the terms of the contract the company is bound to convey to

the place of destination, can release the company from the care and custody of an article by taking it into his own immediate charge; but I think the circumstances should be very strong to show such an intention on the part of the passenger, and to relieve the company of their ordinary liability. And it is not because a part of the passenger's luggage which is to be conveyed with him is, by the mutual consent of the company and himself, placed with him in the carriage in which he travels, that the company are to be considered as released from their ordinary obligations. Nothing could be more inconvenient than that the practice of placing small articles, which it is convenient to the passenger to have about him, in the carriage in which he travels, should be discontinued; and if the company were, from the mere fact of articles of this description being placed in a carriage with a passenger, to be thereby relieved from the obligation of safe carriage, it would follow that no one who has occasion to leave the carriage temporarily could do so consistently with the safety of his property. I cannot think, therefore, we ought to come to any conclusion which would have the effect of relieving the company as carriers from their obligation to carry safely, which obligation, for general convenience of the public, ought to attach to them. I cannot help thinking, therefore, we ought to require very special circumstances, such in fact as would lead irresistibly to the conclusion that the passenger takes such personal control and charge of his property as altogether to give up all hold upon the company, before we say that the company, as carriers, are relieved from their liability in case of loss. If, therefore, this case had depended on the question whether or not the company were liable upon the general issue, I should be of the opinion that the plaintiff was entitled to recover."

§ 75. A servant travelling with his master on a railway, may have an action in his own name against the company for the loss of his baggage, although the master took and

paid for his ticket. The liability, in such case, is independent of contract, and the payment by the master will satisfy an averment of payment by the plaintiff.²⁰ But it has been held, that the father might have an action for the loss of his son's baggage while he was employed upon his own business, and had been furnished by his father with a travelling trunk and clothes for the journey?²¹ And it is not important whether the passenger pay his own fare or it is paid by his friends.²²

§ 76. Common carriers of passengers sometimes assume to incur no responsibility for baggage unless delivered to their agents within a certain period before the departure of the passenger. But we apprehend that in such cases, if their servants at the proper place for receiving such luggage accept the same, to be carried with the passenger within any reasonable time, as the same day, or the night following, or the next morning,²³ they must be regarded as having accepted it, as common carriers, and their responsibility as such attaches. Thus in Connecticut²⁴ the plaintiff took his trunk to a railway station at eleven o'clock, A. M., and requested that it be checked for the next train to B., which was to leave at three P. M., but being informed that they did not give checks for baggage until within fifteen minutes of the departure of the train, he left his trunk with the agent, and at the proper time obtained a check and went himself by the same train. When he received his trunk at the end of the route, some money and clothing had been taken from it, but whether before or after its being checked did

²⁰ *Marshall v. York, Newcastle, & Berwick Railw.*, 11 C. B. 655; s. c., 7 Eng. L. & Eq. 519. In a declaration in case, against a common carrier, it is not necessary to allege the payment of, or agreement to pay, compensation. *Hall v. Cheney*, 36 N. H. 26.

²¹ *Grant v. Newton*, 1 E. D. Smith, 95.

²² *Van Horn v. Kermit*, 4 E. D. Smith, 453.

²³ *Camden & Amboy Railw. Co. v. Belknap*, 21 Wendell, 354.

²⁴ *Hickox v. Naugatuck Railw. Co.*, 31 Conn., 281.

not appear. The court held it immaterial, since the responsibility of the company, as carriers, attached upon the first receipt of the trunk; and the giving the check was only in the nature of a receipt, and did not control the time of the responsibility of the company attaching.²⁴

CHAPTER VII.

WHAT LIMITATIONS AND RESTRICTIONS CARRIERS MAY ENFORCE IN REGARD TO BAGGAGE.

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| <p>§§ 77 and 81. <i>Not liable for merchandise which passenger carries covertly.</i></p> <p>§ 78. <i>And it makes no difference that the passenger has no other trunk.</i></p> <p>§ 79. <i>Jewelry, being female attire, and a watch in a trunk, proper baggage.</i></p> <p>§ 80 and n. 6. <i>So also are, money for expenses, books for reading, clothing, spectacles, tools of trade, and many other similar things.</i></p> <p>§ 82. <i>Carrier responsible for baggage, when passenger goes by another conveyance.</i></p> | <p>§ 83. <i>Cannot restrict all responsibility for baggage. May make reasonable regulations and follow them.</i></p> <p>§ 84. <i>Definition of trinkets under the English statute.</i></p> <p>§ 85. <i>In England companies may exclude baggage from cheap trains.</i></p> <p>§ 86. <i>Stage proprietors, etc., responsible for luggage of their passengers.</i></p> <p>§ 87. <i>But where employed by hotel keepers to transport their guests, both responsible.</i></p> |
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§ 77. RAILWAYS, as carriers of passengers, are not liable for the loss of a package of merchandise which a passenger brings upon the train packed as baggage, unless the company, having an opportunity to know the contents of the package, see fit to accept it as baggage.¹ This question was considerably discussed in a recent case in New Hampshire,² where it was held that the carrier is not responsible

¹ Great Northern Railw. v. Shepherd, 8 Exch. 30; s. c., 9 Eng. L. & Eq. 477. In this case the court gravely declare that a husband and wife, travelling together, may take 112 lbs. baggage, the limit for one person, by act of Parliament, being fifty-six pounds. Richard v. Wescott, 2 Bosw. 589; *post*, § 81.

² Smith & wife v. B. & M. Railw. Co., 3 Am. Law Reg. (N. S.) 126; s. c. 44 N. H. 325. It seems to us that one of the conditions named in this case as the only ground of the liability of the carrier, is not indispensable, namely, that he should receive pay for the transportation by the passenger ticket. That is a thing which could never be proved, either in the affirmative or negative. If the carrier knowing its contents, accepts a bundle, or box, or trunk, containing merchandise, *as baggage*, we see no reason why he should not be responsible as a common carrier. If payment is made for a trunk of goods or merchandise, as extra baggage, the carrier is clearly responsible for its safe delivery.

for merchandise which a passenger takes along with him, unless a reward is given for the transportation, or it be of a character which by usage or custom is to be regarded as travelling baggage. And the fact that other passengers, on other occasions, had taken along with them in the passenger cars similar bundles of merchandise without objection, has no legal tendency to prove that the bundle in question was transported at the risk of the carrier, unless it were shown that such bundles were knowingly carried as part of the baggage and paid for by the passenger ticket. But the carrier, although not liable as an insurer, will be liable, as an ordinary bailee without hire, for any loss or damage which is proved to have been caused by his own gross negligence or that of his servants.

§ 78. So the word "baggage" was held not to include a trunk containing valuable merchandise and nothing else, although it did not appear the passenger had any other trunk with him,³ nor samples of merchandise, carried to enable the passenger to make bargains.⁴ This question was considered and determined in the House of Lords,⁵ where the law

³ *Pardee v. Drew*, 25 Wend. 459. It was held that "thirty-eight pairs of new shoes, stock for sixty pairs boy's shoes, and two papers shoe-nails," are not included under the term "baggage." *Collins v. Boston & Maine Railw.*, 10 Cush. 506.

⁴ *Hawkins v. Hoffman*, 6 Hill, 586; *Dibble v. Brown*, 12 Ga. 217. But where a passenger delivered a box, containing embroideries, to the agent for receiving baggage, and demanded a check for the place of his destination, and was told that the company "did not check such goods," but that they would go safely, it was held the company were liable for the loss of the box, as common carriers, on the ground that there was no attempt to deceive them, or to have the parcel pass as baggage, unless they consented, and if they consented to accept and carry it, in a passenger train, they were liable, and might charge freight the same as if they carried it upon their freight trains. This seems to be a very reasonable view of the case. *Butler v. Hudson River Railw.* 3 E. D. Smith, 571. But there must be some proof that the person accepting the parcel was the proper agent for that purpose, or that it was placed in the company's cars. *Ib.*

⁵ *Belfast & B. & L. & C. Railw. Co. v. Keys*, 8 Jur. (N. S.) 367, 9 H. Lds. Cas. 556, on appeal from the Exchequer Chamber in Ireland; 11 Ir. Com. L. R. 145; s. c. in C. B., 8 id. 167. In one report of the case, the reason assigned is, that the replication was bad, for not naming that the company had notice that the box contained merchandise, and this is the precise ground upon which the opinion of the judges is placed by Chief Baron *Pollock*. But the Lord Chancellor, in giving the

lords discussed the question at length. In this case the passenger took a through ticket, and had in his personal charge a case containing gold and silver watches, which an officer of the company on the journey requested the passenger to give him to be deposited in the luggage van, which was accordingly done. The property was subsequently stolen by one of the company's servants. By the rules of the company all merchandise not being personal luggage was to be paid for. An action was brought to recover the value of the case and watches. The defendant pleaded that the plaintiff was only entitled to carry personal baggage, whereas the case in question was merchandise. The plaintiff replied that the case manifestly contained merchandise, and was received by the defendants without objection, and without their demanding extra remuneration, and without inquiry as to the value of the case. The jury found that the case manifestly did contain merchandise, and that there was no improper concealment on the part of the plaintiff in respect of it, and that the defendants were guilty of gross negligence. On motion to enter up judgment for the defendant *non obstante veredicto*, on the ground that the replication was no valid answer to

leading opinion, puts the case mainly upon the ground, that the plaintiff intended to mislead the company, and covertly carry merchandise as baggage. And Lord *Wensleydale* puts the case upon the precise ground stated in the text. And in the case of *Cahill v. London & N. W. Railw. Co.*, 10 C. B. (N. S.) 154; s. c. 7 Jur. (N. S.) 1164; 8 id. 1063, Exch. Chamber, 13 C. B. (N. S.) 818, it was held a railway company is not liable for the loss of merchandise delivered to them by a passenger as his personal luggage, without notice that the luggage contained merchandise. In this case the act of Parliament and the rules of the company allowed a certain weight of luggage with each passenger without additional charge; but the passenger was in fact ignorant of both. But the court considered he was bound to know the act of Parliament. The box in this case was marked, in large letters, — "glass"; but the company were held not responsible. But in the Exchequer Chamber the judgment was reversed, and the company held responsible, as if for so much luggage; for, having suffered the passenger to treat it as luggage, they could not, after the loss, set up that it was merchandise, and that therefore they were not responsible. The case of the *Belfast Railw. Co. v. Keys*, *ante*, was here cited, and this seems to be the view taken in the Exchequer Chamber of the law of that case, from which we cannot dissent.

the special defense, the Exchequer Chamber, affirming the judgment of the Common Pleas, held the replication a good answer to the defense. The House of Lords reversed the judgment and held the defendants not liable. This was upon the ground that although by the original contract the plaintiff was not to pay anything for his luggage, he was bound to pay for his merchandise, and the acceptance of the case by the servant of the company did not alter the contract made by the company. This seems to us to be carrying the law to the very extreme on behalf of the company; further than necessity or fair dealing towards the passenger would seem to justify. The act of the servant in the course of his employment should bind the company. The decision of the Irish courts appears more satisfactory than that of the House of Lords, but the latter is now the law of England. But the later cases cited in note 5 seem to qualify this very essentially.

§ 79. In one case the carrier was held responsible for articles of jewelry, carried among baggage, which were a part of female dress, the plaintiff travelling with his family, such articles being treated without question as forming a part of the passenger's baggage.⁶ So a watch carried in one's trunk is proper baggage.⁷ And so of linen cut into shirt bosoms.⁸ Finger-rings have also been regarded as wearing apparel.⁹ But a dozen silver tea-spoons, or a Colt's pistol, or surgical instruments, except the passenger be connected with the profession, are not properly a portion of the travelling baggage.¹⁰ And title-deeds and documents, which

⁶ *Brooke v. Pickwick*, 4 Bing. 218; *McGill v. Rowand*, 3 Penn. St. 451. In *Whitmore v. Steamboat Caroline*, 20 Mo. 513, it was held not to be within the ordinary duty of a steamboat, as a common carrier, to transport specie, and that the officers could not bind the proprietors by such an undertaking, unless by proof of a usage, and that a passenger's baggage only included specie to the extent of his probable expenses. But see *Nevins v. Bay Steamboat Co.*, 4 Bosw. 225.

⁷ *Jones v. Voorhees*, 10 Ohio 145.

⁸ *Duffy v. Thompson*, 4 E. D. Smith, 178.

⁹ *McCormick v. Hudson River Railw.*, 4 E. D. Smith, 181.

¹⁰ *Giles v. Fauntleroy*, 13 Md. 126.

an attorney is carrying with him to use on a trial, are not luggage; nor is a considerable amount of bank notes, carried to meet the contingencies or exigencies of the case.¹¹

§ 80. And railways, as carriers of passengers, are not liable for money, which passengers may carry as baggage, beyond a reasonable amount for travelling expenses.¹² The passenger is allowed to take not only money sufficient to defray the ordinary expenses of the journey contemplated, but any reasonable sum in addition, for such contingencies as are not improbable.¹³ But in one case it was held, with-

¹¹ *Phelps v. London & N. W. Railw. Co.*, 19 C. B. (N. S.) 321.

¹² *Orange Co. Bank v. Brown*, 9 Wend. 85; *Weed v. Saratoga & Schen. Rail.*, 19 Wend. 534; *Bell v. Drew*, 4 E. D. Smith, 59; *Duffy v. Thompson*, 4 E. D. Smith, 178.

In the case of *Jordan v. Fall River Railw.*, 5 Cush. 69, the rule, in regard to money carried by a passenger as part of his baggage, is thus laid down by *Fletcher, J.*: "Money *bonâ fide* taken for travelling expenses and personal use, may properly be regarded as forming a part of the traveller's baggage." And this is, perhaps, as satisfactory and as definite a rule as the subject admits of. *Taylor v. Monnot*, 1 Abbott's Pr. 325; *Merrill v. Grinnell*, 30 N. Y. 594.

In Tennessee it seems to have been considered, that money beyond expenses, or a watch, are not a proper part of one's baggage in travelling. *Bomar v. Maxwell*, 9 Humphrey, 621. And in the case of *Doyle v. Kiser*, 6 Porter, 242, where a passenger on a canal boat had \$4,000 in gold in his carpet-bag, which he did not name to the officers of the boat, and which was stolen during his passage, it was held the carriers were not liable beyond the value of the ordinary articles of baggage lost. *Perkins, J.*, enumerates as such, "clothing, travelling expense money, books for reading and amusement, a watch, ladies' jewelry for dressing." A gold watch and gold spectacles were held such in the case of the *Steamer H. M. Wright*, *Newberry's Admiralt.* 494. And in *Davis v. Cayuga & Susquehannah Railw.*, 10 How. Pr. 330, it was held, that a harness-maker's tools, valued at \$10, and a rifle were to be regarded as properly forming a part of the passenger's baggage on a railway, and that the possession of the company's check was *primâ facie* evidence of his having been a passenger on their trains, and that he had baggage checked on that occasion, the possession of the check being accompanied with proof of the custom of the company to put checks upon all baggage where it was required, and to give duplicates to the passengers. See also *New Orleans Railw. etc. v. Moore*, 40 Miss. 39. And a railway company cannot be made responsible for watches and valuable merchandise as passenger's baggage, even where the extra weight is specially paid for. *C. & Ch. Air Line Railw. v. Marcus*, 38 Ill. 219; *Hutchings v. Western Railw.*, 25 Ga. 61.

¹³ *Johnson v. Stone*, 11 Humphrey, 419.

out much reason, we think, that if the passenger carried necessary money for his journey in his trunk, the company were not liable for the loss.¹⁴ And other cases have expressed doubts in regard to the general responsibility of common carriers for bank bills.¹⁵ And in another case,¹⁶ where the passenger had in his trunk sixty dollars for the purpose of purchasing clothing at the place of his destination, it was held the carriers were not liable as such for any additional damages on account of the loss of this money.

§ 81. And where the plaintiff sent, by a passenger train, a quantity of merchandise, expecting to go himself in the same train but did not, and the goods were lost without any gross negligence or any conversion by the carriers, it was held they were not liable.¹⁷

§ 82. But where a passenger in a vessel had his baggage put on board another vessel because it did not arrive by cars in time for that on which he had taken passage, it was held that the owner of the vessel was not to be regarded as a gratuitous bailee but as a common carrier, being entitled to demand pay for the transportation under the circumstances, either in advance or at the end of the voyage. It is here said, that in the common case, where the baggage accompanies the passenger, his fare includes fare for his baggage, but in any case, where a passenger orders his baggage sent by a carrier independent of any one to accompany it, if the carrier consent to accept the charge he

¹⁴ *Grant v. Newton*, 1 E. D. Smith, 95.

¹⁵ *Chicago & Aurora Railw. v. Thompson*, 19 Ill. 578. In *Ill. Cent. Railw. v. Copeland*, it is held a reasonable amount of bank bills may be carried in a trunk, and their value recovered as lost baggage. 24 Ill. 332.

¹⁶ *Hickox v. Naugatuck Railw. Co.*, 31 Conn. 281. We should have thought, on first impression, that this amount of money, for this purpose, might well enough have been included in the category of necessary or convenient personal baggage; but the court thought otherwise, and reversed the judgment of Mr Justice *McCurdy* in the court below, upon this ground alone.

¹⁷ *Collins v. Boston & Maine Railw.*, 10 Cush. 506. But it has been held, that

may demand compensation, as before stated, and is liable as in ordinary cases.¹⁸

§ 83. But companies cannot make such restrictions in regard to the kind of baggage and the mode of transportation as to virtually exonerate themselves from just responsibility.¹⁹ But in any case, where the company are justified in refusing to carry a package, they may lawfully take it, if left on their premises, to the lost property office, and charge their regular fee upon redelivery.¹⁹

§ 84. It is often made a question under the English Carriers' Act what is embraced under the word "trinkets." They must be either things of mere ornament, or, where that element predominates, such as bracelets, shirt pins, rings, portmonnaies.²⁰ Common carriers of passengers may restrict their common-law responsibility as insurers of the delivery of baggage.²¹

§ 85. In England, where the act of Parliament allows every passenger to carry a certain weight of luggage, it is held not to preclude the companies from excluding all luggage from cheap excursion trains, and where a passenger on such trains puts his baggage in the van, the company may

where by the printed rules of a railway company the baggage-masters were prohibited from receiving merchandise on passenger trains, and he nevertheless took a carpet, the passenger not knowing of the rule, the company was held liable for the loss of the carpet. *Minter v. Pacific Railw. Co.*, 41 Mo. 503. And where checks for baggage worth \$400 were delivered to a carrier, and a receipt taken on which was printed "Liability limited to \$100 except by special agreement," there being no proof of assent to these terms except by accepting the receipt, and the baggage was lost by the carrier's negligence, he was held responsible for the whole value, on the ground that the proof of assent to the limitation was not satisfactory, and if it were it did not excuse the carrier for negligence but only as insured. *Prentice v. Decker*, 49 Barb. 21; *Limburger v. Wescott*, id. 283. Carrier not responsible for silver ware carried in the trunk of a passenger, as baggage. *Bell v. Drew*, 4 E. D. Smith, 59.

¹⁸ *The Elvira Harbeck*, 2 Blatch. C. Ct. 336.

¹⁹ *Munster v. Southeastern Railw. Co.*, 4 C. B. (N. S.) 676.

²⁰ *Bernstein v. Baxendale*, 6 C. B. (N. S.) 251; 5 Jur. (N. S.) 1056. So silk watch-guards are "silk in a manufactured state"; and smelling-bottles come within the term "glass," used in the act. *Ib.*

²¹ *Peninsular & Oriental Steam Nav. Co. v. Shand*, 3 Moore P. C. C. (N. S.) 272; s. c., 11 Jur. (N. S.) 771.

demand reasonable compensation for its transportation.²² But a railway company is liable for a passenger's luggage, although carried in the carriage in which he himself is travelling.²³

§ 86. Stage proprietors and omnibus drivers who assume to carry luggage for all who apply, from the railway stations about the towns, are unquestionably responsible as common carriers, and it does not affect the responsibility of such carriers, where they enter the names of passengers on way-bills, but do not enter the baggage.²⁴

§ 87. But where a hotel-keeper in the vicinity of a railway station gives public notice that he will furnish a free conveyance from the station to his house, for guests, and for this purpose employs the proprietors of certain carriages, it was held that a traveller to whom this arrangement was known, and who employed one of these carriages to carry himself and baggage to this hotel, the baggage being lost by the negligence of the owner of the carriage or his agents, might maintain assumpsit or case for the same against the proprietor of the house.²⁵

²² *Rumsey v. Northeastern Railw. Co.*, 14 C. B. (N. S.) 641; s. c. 10 Jur. (N. S.) 208. And a passenger who accepts a ticket for an excursion train, referring him to a bill on which it is announced that luggage in such trains is at the owner's risk, is not entitled to recover of the company for loss of such baggage, although in fact ignorant of the statement in the bill. And it will make no difference in the responsibility of the company, that they do not allow the passenger to retain his baggage under his own personal control. *Stewart v. London & N. W. Railw. Co.*, 3 H. & C. 135.

²³ *Le Conteur v. London & Southwestern Railw. Co.*, Law Rep. 1, Q. B. 54; 13 L. T. (N. S.) 325.

²⁴ *Peixotti v. McLaughlin*, 1 Strob. 468.

²⁵ *Dickinson v. Winchester*, 4 Cush. 115.

CHAPTER VIII.

TO WHAT EXTENT THE PARTY MAY BE A WITNESS.

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| <p>§ 88. <i>At common law the party could not be a witness in such cases.</i></p> <p>§ 89. <i>Some of the American courts have received this testimony from necessity.</i></p> <p>§ 90-92. <i>Decisions in different States.</i></p> | <p>§ 93. <i>Agents and servants of the company admitted to testify from necessity.</i></p> <p>§ 94. <i>Where the party's oath is not received, the jury are allowed to go upon reasonable presumption.</i></p> |
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§ 88. THE question how far the party claiming to have sustained loss by carriers may be himself a witness in the action, since the general disposition manifested, both in England and this country, to admit the testimony of the parties generally, is becoming of much less importance. We will, nevertheless, refer briefly to the decisions upon this subject. We are not aware that any such exception was ever attempted to be made by the English courts. The general rules of evidence seemed altogether adequate to the exigency. If the carrier had lost the package or parcel, it was by his fault that the difficulty of ascertaining its contents had arisen, and the jury should, on that account, solve all doubts against him.¹

§ 89. But in many of the American courts it has been regarded as one of those exceptions, founded upon necessity, like the loss of a written instrument, where it became indispensable to admit the testimony of the party, the facts being, in presumption of law, confined exclusively to his knowledge. And some of the English books speak of the

¹ Greenleaf's Ev. § 37; *Armory v. Delamirie*, 1 Strange, 505. But the decisions are not uniform upon this subject, especially where there is no intentional withholding of evidence. In such case it has been held the presumption is to be against the plaintiff. *Clunnes v. Pezzey*, 1 Camp. 8; *Dill v. Railroad Co.*, 7 Rich. 158, 163; 6 id. 198.

same rule being applicable to the proof of the contents of a box delivered to, and lost by, a common carrier.² But it does not seem to have been there followed, in recent times, unless the case possessed other features beyond the mere loss of the box, as fraud, or the intentional withholding of evidence. And some of the American cases, where the testimony of the party was admitted, as to the contents of parcels delivered to carriers, and lost by them, have been of the latter character.³ The American courts have evidently admitted the exception with reluctance, and have manifested a constant disposition to restrain it within the narrowest limits.

§ 90. Hence in Pennsylvania they hold that it only extends to such articles of wearing apparel as it may ordinarily be presumed the party himself, or his wife, will have packed, and consequently be the only witnesses able to give testimony⁴ in regard to them.

§ 91. And in Massachusetts the courts have altogether repudiated the rule of the admissibility of the party as a witness, in this class of cases, on the ground of necessity.⁵

² 12 Viner, Ab. 24, pl. 34.

³ *Herman v. Drinkwater*, 1 Greenleaf, 27. This is the earliest case we recollect to have seen of this kind in the American Reports, and was one of fraud, where a shipmaster, having received a trunk of goods on board his vessel for carriage, broke it open and abstracted the goods. This case is virtually reaffirmed in *Gilmore v. Bowdoin*, 3 Fair. 412, and the exception rests here altogether upon the ground of necessity. See *Garvey v. C. & H. Railw.*, 1 Hilton, 280. And the same rule obtains in Illinois. *Parmlee v. McNulty*, 19 Ill. 556; s. c. 20 Ill. 392; *Davis v. Railw.* 22 id. 278.

⁴ *Clark v. Spence*, 10 Watts, 335. See also *David v. Moore*, 2 W. & Serg. 230; *Whitesell v. Crane*, 8 W. & Serg. 369; *McGill v. Rowand*, 3 Penn. St. 451. See also *The County v. Leidy*, 10 Penn. St. 45; *Pudor v. B. & M. Railw.*, 26 Maine, 458; *Dibble v. Brown*, 12 Ga. 217.

⁵ *Snow v. The Eastern Railw. Co.*, 12 Met. 44. But by statute of 1851, c. 147, § 5, it is provided the party may, in such cases, swear to the correctness of a descriptive list of the articles contained in passenger's baggage. And by Gen. St. ch. 131, § 14, parties are witnesses generally. So that this question becomes of comparatively small importance here; and the same is now true in England and in most of the American States. The court here recognize the right of the party to testify to the contents of a parcel of which he is robbed. *Proceedings against the Hundred, B. N. P.* 187; *East Ind. Co. v. Evans*, 1 Vern. 305. The same

§ 92. But in Ohio the courts seem to have adopted the same view of the subject as in Maine and Pennsylvania.⁶

§ 93. In some cases it has been held that the servants of the company, who have charge of things carried on their trains, are *ex necessitate*, competent witnesses, to prove the delivery thereof to the owner, in an action for non-delivery, although they thereby exonerate themselves from blame and liability in a future action.⁷

§ 94. The authorities upon this general subject are not uniform. And where the courts refuse to admit the party to testify to the contents of trunks, etc., lost by common carriers, it becomes matter of necessity to allow the jury to give damages proportioned to the value of the articles, which it may fairly be presumed the trunk, etc., might and did contain.⁸ By the construction of the statute in Kentucky,⁹ the members of railway corporations are made witnesses in suits where the company is a party.

rule upon this subject is adopted in New Jersey as in Massachusetts. *Graby v. Camden & Amboy Railw.*, 19 Law R. 684. So also in Michigan. *Wright v. Caldwell*, 3 Mich. 51. So also in Illinois. *Ill. Central Railw. v. Copeland*, 24 Ill 332.

⁶ *The Mad River & L. Erie Railw. Co. v. Fulton*, 20 Ohio 318. In this case, it was held that the owner of baggage and his wife are competent witnesses to prove the contents of a trunk lost by the plaintiffs, and its value, consisting of the ordinary baggage of a traveller, on the ground of necessity. See also *Johnson v. Stone*, 11 Humph. 419; *Oppenheimer v. Edney*, 9 id. 385.

⁷ *Draper v. Worcester & N. Railw.*, 11 Met. 505; *Moses v. B. & M. Railw.*, 4 Fos. 71, 80.

⁸ *Dill v. Railroad*, 7 Rich. 158; *Stadhecker v. Combs*, 9 Rich. 193.

⁹ Civil Code, § 675; *Covington & Lexington Railw. Co. v. Ingles*, 15 B. Monr. 637. See also, as bearing upon the general question discussed in this section, *Sugg v. Memphis and St. Louis. Packet Co.* 40 Mo. 442; *Moran v. Portland Steam Packet Co.*, 35 Me. 55.

CHAPTER IX.

WHEN THE CARRIER'S RESPONSIBILITY BEGINS.

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| <p>§ 95. <i>Begins, in general terms, upon delivery of the goods.</i></p> <p>§ 96. <i>Delivery at the usual place of receiving goods, with notice, sufficient.</i></p> <p>§ 97. <i>Where goods are delivered to be carried, carrier liable from delivery.</i></p> <p>§ 98. <i>But not responsible on a continuous line till they receive the goods.</i></p> <p>§ 99. <i>Acceptance by agent sufficient, without payment of freight.</i></p> | <p>§ 100. <i>Question of fact, whether carrier took charge of the goods.</i></p> <p>§ 101. <i>Sufficient to charge company, that goods are put in charge of their servants.</i></p> <p>§ 102. <i>Whether goods are left for immediate transportation, matter of inference often.</i></p> |
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§ 95. THERE is no difficulty in defining in general terms when the liability of the carrier begins. It begins when the goods are delivered to him, or his proper servant, authorized to receive them, for carriage.

§ 96. But many questions have arisen as to what amounted to a delivery, so as to put the goods into the constructive custody and risk of the carrier. If the goods are delivered for carriage at the usual place of receiving similar articles, and notice given to the proper servant of the company, there is little chance for any question upon this subject, in regard to the responsibility of the company to the end of their route. For a carrier is bound to keep the goods safely after delivery to him for carriage, as well as to carry safely.¹ Ques-

¹ *Lee*, Ch. J., in *Dale v. Hall*, 1 Wilson, 281; *Merriam v. Hartford and New Haven Railw.*, 20 Conn. 354. In this last case it was decided, that a delivery upon a wharf where steamboat carriers were accustomed to receive their freight, and which they held as private property, fenced off from the street for that purpose, and where they usually had some one to take charge of freight, was a constructive delivery to the carriers, although no notice to the freight-master was proved, it being shown to be the custom of the company to regard all freight delivered on that dock as received for transportation.

tions have often arisen upon this subject, where the person to whom the delivery was made acted as a forwarding merchant or warehouse-keeper, or in some capacity independent of that of carrier, whether the delivery and acceptance of the goods were in the capacity of carrier or agent for the carrier, or in the other capacity which the person sustained.

§ 97. But in the case of railways such questions seldom arise at the beginning of the transit, unless where the goods are delivered to be kept in warehouse until further orders, in which case the liability of carrier will not attach until the goods are ordered to be carried. But when this order is given, and also when the goods are left in the first instance, to be carried presently, the responsibility of the carrier attaches at once.²

§ 98. In a case where a railway formed part of a continuous line of transportation, and had an agent at Charleston (S. C.), to look after goods arriving at that point for the interior along the line of their railway, and a package of goods, so addressed as to have gone over such railway, was lost after its arrival at C., it was held, "that until the goods are in possession of the railway they are not liable as common carriers."³

The goods, in this case, were given in charge of one of the steamboat hands who seemed to have charge of the dock, and who said, on being informed of the delivery, "All right." And the company will be held responsible for all damages accruing after delivery to them, although not allowed to complete the transportation by reason of the interference of the insurers on the ground that the goods are not in fit condition for transportation, and the insurers may recover such damages, if it operate to their loss. *Rogers v. West*, 9 Ind. 400. See also *Lake-man v. Grinnell*, 5 Bosw. 625.

² *Spade v. Hudson River Railw.*, 16 Barb. 383. In this case the plaintiff took part of the goods away, after they were put into the custody of defendants' servants, without their knowledge, and it was held, the company were simply depositaries, and were not liable as carriers; and the plaintiff could not call upon a jury to conjecture how many of the goods were lost, but must show first how many he took away, and how many he left.

³ *Maybin v. The S. C. Railw.*, 8 Rich. 240. In the case of *Bonney v. The Huntress*, 4 Law J. 38, s. c., *nom. The Huntress*, Dav. C. C. Rep. 83, in Admiralty, for a box of goods shipped at Boston, to be delivered at Portland, it

§ 99. It has been held sufficient to charge the carrier, that the delivery was at a place and to a person where and with whom parcels were accustomed to be left for this carrier; and it is immaterial whether any payment of freight is made to this person.⁴

§ 100. But an acceptance by the carrier at an unusual place, will be sufficient to charge him. It seems always sufficient that the goods are "put into the charge of the carrier."⁵ And what is a sufficient putting in charge of the carrier, must always be a question of fact, to be judged of by the jury, with reference to all the circumstances of the case, and the usual course of business in similar transactions, at the same place and with the same company. And it will be found ordinarily to resolve itself into this inquiry, whether the owner of the goods did all to effect a secure delivery to the carrier which it was reasonable to expect a prudent man to have done under the circumstances.

§ 101. But the cases all agree that it is always sufficient if the proper servants of the company accept the goods to carry, whether the acceptance is in writing or not, or whether any bill or any entry in the books of the company is made.⁶ And the point of such acceptance and charge by the carrier is ordinarily when the goods are put into the charge of those who are in law the servants of the carrier.⁷

was held, "It is the duty of the owners of goods to have them properly marked, and to present them to the carrier, or his servants, to have them entered on their books, and if they neglect to do it, and there is a misdelivery and loss in consequence, without any fault of the carrier, the owners must bear the loss. See *Krender v. Woolcott*, 1 Hilton, 223.

⁴ *Burrell v. North*, 2 C. & Kirwan, 680. *Erle, J.*, said, "If the defendant allow these persons to receive parcels, to be conveyed by him, as a carrier, this is quite enough."

⁵ Lord *Ellenborough*, Ch. J., in *Boehm v. Combe*, 2 M. & S. 172.

⁶ *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16; *Phillips v. Earle*, 8 Pick. 182; *Pickford v. Grand Junction Railw.*, 12 M. & W. 766.

⁷ *Boys v. Pink*, 8 C. & P. 361; *Davey v. Mason*, 1 Car. & M. 45. But the crew of a steamboat are not the agents of the boat, for the purpose of receiving freight, whereby to charge the owner as a common carrier. *Trowbridge v. Chapin*, 23 Conn. 595. See also *Ford v. Mitchell*, 21 Ind. 54.

It has been considered that if the owner assume the care and custody of the thing himself, instead of trusting it to the carrier, the carrier is not liable for the loss.⁸ But the fact that the owner accompanies the goods to keep an eye upon them, if he do not exclude the care of the carrier's servants, will not excuse the carrier.⁹ But it has been held, that the delivery of the goods must be made known to the servants of the company or carriers. This would seem indispensable ordinarily to constitute carefulness and good faith on the part of the owner.¹⁰

⁸ *Tower v. The Utica & S. Railw.*, 7 Hill (N. Y.), 47. This is the case of a passenger who left his overcoat upon the seat in the car and forgot to take it. *Miles v. Cattle*, 6 Bing. 743, is to the same effect. *Post*, ch. xviii. But a passenger carrier is not liable for what is not ordinary baggage. *Orange Co. Bank v. Brown*, 9 Wendell, 85; *East Ind. Co. v. Pullen*, 2 Strange, 690. *Ante*, ch. vi., vii.

⁹ *Robinson v. Dunmore*, 2 Bos. & P. 416.

¹⁰ *Selway v. Holloway*, 1 Ld. Ray. 46; *Packard v. Getman*, 6 Cow. 757. In one case, *Illinois Central Railw. v. Smyser*, 38 Ill. 354, where warehousemen having cotton to send by rail applied to the company, who ran a car upon a side-track to the warehouse. The cotton was loaded upon the car, and the agents of the company notified. It was the custom of the company, upon receiving such notice, to have the bales counted and give a bill of lading, in which it was their custom, known to the other party, to except losses by fire, and then send an engine to remove the cars. Before these last steps had been taken the cotton was destroyed by fire. It was held, the delivery was complete, and as the bill of lading had not been made and accepted, they could not claim any exemption from common-law responsibility, and were liable for the loss. But it is fair to say, that the decision would meet the highest sense of justice, more fully, if the delivery had been held only to incur the responsibility which the company were expected by the warehousemen to assume.

But a delivery to the mate of a vessel by which goods are to be carried, is sufficient to charge the owner as carrier, when that is the custom of the wharf, and the wharfinger's responsibility terminates thereupon. *Cobban v. Doune*, 5 Esp. 41.

And where a heavy article was carried by a truckman, upon the grounds, and to the depot of a railway company, for transportation, and had been accepted and taken charge of for that purpose, and was afterwards injured while being loaded upon the company's cars, in part through the carelessness of the truckman, it was held, the company were responsible, their responsibility having attached by their servants taking charge of the goods and being engaged in loading the same upon a car at the time the damage occurred. *Merritt v. Old Colony & Newport Railway*, 11 Allen, 80.

And where goods had been accepted by the master of a ship in pursuance of the contract of affreightment and were destroyed by the bursting of a boiler of

§ 102. Where a railway have a warehouse, at which they receive goods for transportation, as common carriers, and goods are delivered there with instructions to forward presently, the company are liable, as common carriers, for the delivery of the goods. But if they are kept back by direction of the owner, the company are only responsible as depositaries.¹¹ Instructions to forward forthwith may be inferred from the course of business in the absence of express proof.¹¹ And where the owner gave instructions to forward immediately, he will not be bound by counter instructions given by the cartman without his authority.¹¹

the ship, while alongside in the lighter, it was held, the owner might recover for the loss, and that he had a lien upon the ship. *The Bark Edwin*, 1 Sprague, 477. See also *Schooner Freeman*, 18 How. U. S. 182.

After the carrier has receipted for the goods, they are as much at his risk as if they were aboard the vessel. *Greenwood v. Cooper*, 10 La. Ann. 776.

¹¹ *Moses v. Boston and Maine Railw.*, 4 Foster, 71. And if the defendants are both warehousemen and carriers, and receive goods, with instructions to forward immediately, they are liable as carriers. *Clarke v. Needles*, 25 Penn. St. 338; *Blossom v. Griffin*, 3 Kernan, 569.

But where goods are received as wharfingers, or warehousemen, or forwarding merchants, and not as carriers, the bailors are only liable for ordinary neglect. *Platt v. Hibbard*, 7 Cowen, 497. See *Mich. Southern & Northern Ind. Railw. Co. v. Shurtz*, 7 Mich. 515.

And where the owner after making delivery to the carrier, requests that the goods be not forwarded until he hear from the consignee, and in the mean time the goods being combustible are consumed by fire, communicated from an engine of the company; it was held, that the direction relieved them from the responsibility of carriers, and they were only liable for negligence as warehousemen. *St. Louis &c. Railw. v. Montgomery*, 39 Ill. 335.

CHAPTER X.

TERMINATION OF CARRIER'S RESPONSIBILITY.

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| <p>§ 103. <i>Responsibility of carrier of parcels for delivery.</i></p> <p>§ 104. <i>Company not bound to make delivery of ordinary freight.</i></p> <p>§ 105. <i>The duty, as to delivery, affected by facts, and course of business.</i></p> <p>§ 106. <i>Railway company ordinarily not bound to deliver goods, or give notice of arrival.</i></p> <p>§ 107. <i>Rule, in regard to delivery, in carriage by water.</i></p> <p>§ 108. <i>Only bound to keep goods reasonable time after arrival.</i></p> <p>§ 109. <i>Consignee must have reasonable opportunity to remove goods.</i></p> <p>§ 110. <i>After this, carrier only liable for ordinary neglect.</i></p> <p>§ 111. <i>If goods arrive out of time, consignee must have time to remove, after knowledge of arrival.</i></p> <p>§ 112. <i>So if company's agent misinform the consignee.</i></p> <p>§ 113. <i>Carrier excused, when consignee assumes control of goods.</i></p> <p>§ 114. <i>Effect of warehousing, at intermediate points, in route.</i></p> <p>§ 115. <i>If next carrier has place of receiving goods, responsibility ceases on delivery there.</i></p> <p>§ 116. <i>Warehousemen, who are also carriers, held responsible as carriers, on receipt of goods, generally.</i></p> <p>§ 117. <i>Goods addressed by carrier to his own agent does not terminate transit.</i></p> <p>§ 118. <i>Consignee refusing goods, duty of carriers.</i></p> | <p>§ 119. <i>Leading facts in an English case on same point, and ruling of Exchequer Chamber.</i></p> <p>§ 120. <i>Duty of the carrier in such cases, by American decisions.</i></p> <p>§ 121. <i>May put goods in his own or other warehouse.</i></p> <p>§ 122. <i>Where the carrier by water cannot find the consignee, he may exonerate himself by delivery to a responsible warehouseman.</i></p> <p>§ 123. <i>An English case exonerating the carrier on arrival of the goods, it being Sunday, no delivery could be made until Monday. Quære?</i></p> <p>§ 124. <i>The carrier's responsibility ends when the warehouseman's crane is attached to hoist the goods.</i></p> <p>§ 125. <i>Unlawful seizure or invalid claim of lien no excuse to the carrier for non-delivery.</i></p> <p>§ 126. <i>In carriage by water the delivery to the consignee must be according to the custom of trade and the usages of the port and in regular business hours.</i></p> <p>§ 127. <i>Tender to the party entitled to receive the goods will exonerate the carrier, as such, and he will then only be responsible as an ordinary bailee.</i></p> <p>§ 128. <i>Arrangement with consignee binding.</i></p> <p>§ 129. <i>In carriage by water, in general, there must be notice to consignee and delivery at the wharf, etc.</i></p> <p>§ 130. <i>Carrier cannot charge for carrying to and from depot, unless, etc.</i></p> <p>§ 131. <i>By English statute can make no discrimination among customers.</i></p> |
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§ 103. WHERE, by the course of a carrier's business, he is accustomed to deliver goods and parcels by means of

porters or servants at the dwellings or places of business of the consignees, as was formerly the case, to a great extent, in England, and as is now done by express companies in this country, the carrier's responsibility continues, until an actual delivery to the consignee, or at his dwelling or place of business.¹ So, too, if the carrier deliver a parcel to a wrong person, without fault on the part of the owner, he is liable, as for a conversion.²

§ 104. But this mode of delivery has no application to the ordinary business of railways as common carriers of goods. The transportation being confined to a given line, according to the ordinary and reasonable course of business, goods must be delivered and received at the stations of the company. And unless they adopt a different course of business, so as to create a different expectation, or stipulated for something more, there is no obligation to receive or to deliver freight in any other mode. But where such companies contract to receive or to deliver goods at other places, or where such is the course of their business, they are undoubtedly bound by such undertakings, or by such usage and course of business.³

¹ *Hyde v. Trent & Mersey Navigation Co.*, 5 T. R. 389. In this case the carrier charged for cartage to the house of the consignee. In *Stephenson v. Hart*, 4 Bing. 476, it was considered a proper inquiry for the jury, "whether the defendants had delivered the box according to the due course of their business, as carriers." *Golden v. Manning*, 2 Wm. Bl. 916; 3 Wil. 429, 433. See also *Bartlett v. Steamboat Philadelphia*, 32 Mo. 256. In *Tooker v. Gormer*, 2 Hilton, 71, it is held, that where the goods are intrusted to a carrier with a bill to collect, he is liable for a delivery without exacting payment. *Wardell v. Mountyan*, 2 Esp. 693; *Storr v. Crowley*, M'Clel. and Y. 136.

² *Duff v. Budd*, 3 Brod. & B. 177. So, too, if the carrier deliver the goods at a different place from that named in the bill of lading, although one named in former consignments of the same parties. *Sanquer v. London, &c. Railw.*, 16 C. B. 163; 32 Eng. L. & Eq. 338; *Clafin v. Boston & L. Railw. Co.*, 7 Allen, 341. And the carrier may maintain an action in his own name for injury done to the property intrusted to him, and may recover the value of the property which he will hold in trust for the owner. *Merrick v. Brainerd*, 38 Barb. 574. But in an action for the non-delivery of the goods the owner cannot recover for an injury to the goods. *Nudd v. Wells & Co.*, 11 Wis. 407.

³ *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt.

§ 105. The cases to some extent regard the question, when the duty of the carrier ends, as one of fact or contract to

186, 209; *Noyes v. Rut. & Bur. Railw.*, 27 Vt. 110; 1 Parsons on Cont. 661. We here adopt Professor Parsons' note of the case (23 Vt. 186, *supra*). "This is one of the strongest cases in the books upon this point. The defendants were common carriers on Lake Champlain, from Burlington to St. Albans, touching at Port Kent and Plattsburg long enough to discharge and receive freight and passengers. This action was brought against them to recover for the loss of a package of bank bills. It appeared in evidence that the package in question, which was directed to Richard Yates, Esq., Cashier, Plattsburg, N. Y., was delivered by the teller of the plaintiffs' bank to the captain of defendants' boat, which ran daily from Burlington to Plattsburg, the captain delivered the package to one Ladd, a wharfinger, and that it was lost or stolen while in Ladd's possession. No notice was given by the captain of the boat to the consignee of the arrival of the package, nor had he any knowledge of it until after it was lost. The principal question in the case was, whether the package was sufficiently delivered to discharge the defendants from their liability as carriers. The defendants offered evidence to show that a delivery to the wharfinger, without notice, under the circumstances of the case, was a good delivery according to their own uniform usage, and the usage of other carriers similarly situated. The case has been before the Supreme Court of Vermont three times, and that court has uniformly held, that, in the absence of any special contract, a delivery to the wharfinger without notice, if warranted by the usage of the place, was sufficient, and discharged the defendants from all liability. When the case was before the court the last time, the court said:—

"The only difficulty which the court, from the first, have ever felt in this case has been in regard to the extent of the defendants' undertaking to convey the parcel; in other words, as to the extent and termination of the transit or carriage by the defendants. The county court, in the trial of this case, seem to have assumed that in the law of carriers there was a general well-defined rule upon this subject, and that the defendants were attempting to escape from its operation by means of some local usage or custom, in contravention of the general rules of law upon the subject. In this view of the case, the defendants were justly held to great strictness in the proof of the usage. It becomes, therefore, of chief importance to determine how far there is any such general rule of law as that which is assumed in the decision of the case in the court below. If the law fixes the extent of the contract, in every instance, in the manner assumed, then, most undoubtedly, are the defendants liable in this case, unless they can show, in the manner required, some controlling usage. But if, upon examination, it shall appear that there is no rule of law applicable to the subject, and the extent of the transit is matter resting altogether in proof, then the course of business at the place of destination, the usage or practice of the defendants, and other carriers, if any, at that port and at that wharf, become essential and controlling ingredients in the contract itself. All the cases, almost without exception, regard the question of the time and place when the duty of the carrier ends as one of contract, to be determined by the jury from a consideration of all that was said by either party at

be determined by the jury, with reference to the mode of transportation, the special undertaking, if any, the course of business at the place, and other attending circumstances. It finally resolves itself often into the inquiry whether the carrier did all, in respect to the goods, which, under the peculiar duties of his office, the owner had a right to expect of him.³

§ 106. But where the facts are not disputed, and the course of business of the carrier is uniform, the extent of the carrier's liability will become a question of law merely, as all such matters are under such circumstances.³ And we understand the cases to have settled the question that the carrier by railway is neither bound to deliver to the

the time of the delivery and acceptance of the parcels by the carrier, the course of the business, the practice of the carrier, and all other attending circumstances, the same as any other contract, in order to determine the intention of the parties. The inquiry, then, in the present case, must come to this before the jury, whether it was reasonable for the plaintiffs, under the circumstances, to expect the defendants to do more than to deliver the parcel to the wharfinger? If not, then that was the contract, and that ended their responsibility, and the plaintiffs cannot complain of the defendants because the wharfinger was unfaithful. The defendants, unless they have either expressly or by fair implication undertaken on their part to do something more than deliver the parcel to the wharfinger, are no more liable for its loss than they would have been had it been lost upon ever so extensive a route of successive carriers, had it been intended to reach some remote destination in that mode. But if the plaintiffs can satisfy the jury that from the circumstances attending the delivery, or the course of the business, they were fairly justified in expecting the defendants to make a personal delivery at the bank, they must recover; otherwise, it seems to us, the case is with the defendants. . . .

"It might be consoling to the carriers and to others, if we could lay down a rule of law somewhat more definite in this case. But from the almost infinite diversity of circumstances, as to steamboat carriage, that is impossible. There will usually be at every place some fixed course of doing the business, which will be reasonable, or it would not be submitted to, and which will be easily ascertained on inquiry, and with reference to which contracts will be made, and which it is equally the interest and the duty of both parties to ascertain, before they make contracts, and which it would be esteemed culpable negligence in any one not to ascertain, so far as was important to the correct understanding of contracts which he was making." See also *Barstow v. Murison*, 14 La. Ann. 335; *Gauche v. Storer*, 14 La. Ann. 411; *Gilkinson v. Steamboat Scotland*, 14 La. Ann. 417; *Garey v. Meagher*, 33 Ala. 630; *Hosea v. McCrory*, 12 id. 349.

consignee personally, or to give notice³ of the arrival of the goods. But under peculiar circumstances, as for instance, when the goods arrive out of time; or having failed to arrive in time and the consignee having frequently called for them, and made the utmost inquiry for them for twelve days, not only at the point of destination but at all other places, where they might possibly have been sent by mistake, when the freight-agent took his address and promised to give him notice, whenever the goods should arrive, which occurred six days later and no notice was given; it was held, that under the circumstances, the defendants were bound to give notice, and that the promise of the freight agent was binding upon the company, any rule or custom of the office notwithstanding. But it was here considered that the owner could not, under these circumstances, treat the goods as lost and recover accordingly.⁴

§ 107. The rule of law, and the course of business, in regard to carriage by water, have always been considered different from land carriage. In regard to foreign carriage, it is perfectly well settled that a delivery at the wharf, with notice, and some of the cases say even without notice, unless there be some special undertaking in the bill of lading, is sufficient. The consignee is presumed to have received from his correspondent a copy of the bill of lading, and is bound to take notice of the arrival of the ship.⁵ A distinction has been attempted, in some of the cases, between the foreign and internal and coasting carrying business, in regard to the delivery or landing upon the wharf, being sufficient to exonerate the carrier.⁶

⁴ *Tanner v. Oil Creek Railw.*, 53 Penn. St. 411.

⁵ *Cope v. Cordova*, 1 Rawle, 203, Opinion of *Rogers, J.*; *Angell on Carriers*, §§ 312, 313, *et seq.*; 2 Kent, Comm. 604, 605.

⁶ *Ostrander v. Brown*, 15 Johns. 39, where it was held that such a deposit is not sufficient; but the carrier must continue his custody till the consignee has had sufficient time, after the landing of the goods and notice, to come and take them away. *Hemphill v. Chenie*, 6 Watts & S. 66; *Barclay v. Clyde*, 2 E. D. Smith, 95. If goods be consigned to a particular warehouse, a delivery at a pier in the

§ 108. But the cases all agree that in regard to carriers by ships and steamboats, nothing more is ever required, in the absence of special contract, than landing the goods at the usual wharf, and giving notice to the consignee, and keeping the goods safe a sufficient time after to enable the party to take them away. After that the carrier may put them in warehouse, and will only be liable, as a depositary, for ordinary neglect.⁷ And the prevailing opinion seems to be, at the present time, that the necessity of giving notice of the arrival of the goods depends upon custom and usage, and the course of business at the place.⁸ The course of doing business upon railways, their being confined to a particular route, having stated places of deposit, and generally erecting warehouses for the safe-keeping of goods, all seem to require that the same rule, as to the delivery of goods, should prevail, which does in transportation by ships and steamboats.⁹ Accordingly it was held, that the pro-

place, but not at the warehouse, is not sufficient. *Sultana v. Chapman*, 5 Wisc. 454. See also *Sleade v. Payne*, 14 La. Ann. 453, where the question of delivery and notice is considerably discussed. In a late case in the U. S. Circuit Court before Chief Justice *Chase* the question is carefully examined, with the following result: The duty of a carrier by water is not fulfilled by simple transportation from port to port. The goods must be landed, and the consignee notified of their arrival. Where goods were landed from a vessel and stored in the carrier's storehouse until the consignee should call for them, but no notice of their arrival was given him, proof that such was the carrier's general custom will not relieve him from liability for damage to the goods after such storage, unless there is proof of assent by the owners to such arrangement. A contract of affreightment, to be performed upon tidal waters or navigable rivers wholly within the limits of a State, is a maritime contract within the admiralty jurisdiction of the courts of the United States. *Owners of Mary Washington v. Ayres*, 5 Am. Law Reg. (N. S.) 692.

⁷ *Garside v. Trent & Mersey Nav. Co.*, 4 T. R. 581; *In re Webb*, 8 Taunt. 443; s. c., 2 J. B. Moore, 500; 2 Kent, 605. See *Dean v. Vaccaro*, 2 Head, 488.

⁸ *Price v. Powell*, 3 Comst. 323; *Huston v. Peters*, 1 Met. 558. But in *Dean v. Vaccaro*, *supra*, it is held that the usage or custom of a particular place cannot dispense with delivery or notice of the landing of the goods. See also *Rowland v. Miln*, 2 Hilton, 150, where it is held that a prevention of the landing of the goods by a person without legal authority does not relieve the carrier of his responsibility.

⁹ *Norway Plains Co. v. Boston & Maine Railw.*, 1 Gray, 263. Opinion of *Shaw*,

prietors of a railway, who are common carriers of goods, and when they arrive at their destination, deposit them in their warehouse, without additional charge, until the owner or consignee has a reasonable time to take them away, are not liable as common carriers, for the loss of the goods by fire, without negligence or default on their part, after the goods are unladen from the cars, and placed in the warehouse, but are liable only for ordinary neglect as warehousemen. And it will make no difference, it is here said, in regard to the liability of the carriers, that the goods were destroyed by fire, in the warehouse, before the owner or consignee had opportunity to take them away.¹⁰ This last proposition is perhaps not in strict accordance with most of the cases upon the subject under analogous circumstances. In a late case in New Hampshire,¹¹ the rule of the liability of the carrier and the warehouseman are both

Ch. J., 272. Opinion of court in *Farmers' and Mech. Bank v. Champlain Transp. Co.*, 23 Vt. 211.

¹⁰ *Norway Plains Company v. Boston & Maine Railw.*, 1 Gray, 263. It is said, in this case, that the company is not obliged to give notice to the consignee of the arrival of the goods. Indeed, that point is virtually decided here. For if there is any obligation to give notice, there is also to keep the goods a sufficient time after, to enable the party to remove them. And in this case there was no opportunity to remove them, after the arrival. If there is any ground to question this decision, it is because there was no opportunity to remove the goods after their arrival. See *Morris & Essex Railw. v. Ayers*, 5 Dutch. 393. Where goods transported by a railroad arrive at the place of destination and are placed upon the platform of the depot, at the usual place of discharging goods, ready for delivery to the consignee in good order, and he is notified of their arrival and pays the freight upon them, the liability of the company as carriers is at an end. If the consignee does not receive the goods, it seems that the carrier must take care of them for a reasonable time for the consignee, but his liability in that respect is that of a warehouseman and not that of a carrier. But where the consignee has notice of the situation of the goods at the place of delivery, and pays the freight upon them, and afterwards without neglect on the part of the warehouseman the goods are destroyed, the warehouseman is not liable. It seems, indeed, that the payment of the freight under such circumstances, without any arrangement as to the further custody of the goods by the warehouseman, is equivalent to a delivery so far as to throw the risk of loss upon the consignee. *New Albany & Salem Railroad Co. v. Campbell*, 12 Indiana, 55.

¹¹ *Smith v. Nashua & Lowell Railw.*, 7 Foster, 86.

stated differently somewhat from that laid down in the last case. In regard to the liability of the carrier, as such, it is said it will continue till discharged, "by a delivery of the goods to the bailor, or a tender or offer to deliver them, or such act as the law regards as equivalent to a delivery, as for instance, in some cases, by depositing them in the warehouse of a responsible person." No intimation is here given that a deposit merely in the carrier's own warehouse is sufficient to release the carriers. And in a recent case in Wisconsin,¹² it was decided that the consignee must have a reasonable opportunity to remove the goods after their arrival, before the carrier's duty as such terminates; but the question of reasonable time for that purpose will not be affected by any peculiarity in the condition of the consignee making it convenient to have a longer time than under other and ordinary circumstances. But where the goods arrived at the station about sundown Saturday, and were taken from the cars and placed in the warehouse of the company about dark, and the warehouse closed a few minutes after, and before Monday burnt with the goods, without the fault of the company, the plaintiff residing about three fourths of a mile from the station, and his teamster having called for the goods about three o'clock of that afternoon, and being told by the freight agent that he need not come again that day, as it would be late before the train would arrive, but about dusk he was informed that the goods had come, it was held the company were liable as common carriers.

§ 109. And upon principle, it seems more reasonable to conclude, that the responsibility does not terminate, until

¹² *Wood v. Crocker*, 18 Wis. 345. See also *Ala. & Tenn. Rivers Railway v. Kidd*, 35 Ala. 209, where the same general rule of responsibility for goods after arrival at the place of destination is maintained. It is also said, that if the carrier specially undertake for warehousing, he is responsible for the neglect of any warehouseman to whom he delivers the goods, and the carrier will be bound to warehouse according to his general and well-known custom, but cannot excuse himself by a usage of a few weeks not generally known or to the consignee.

the owner or consignee, by watchfulness, has had, or might have had, an opportunity to remove them. This is certainly so to be regarded, if the building of warehouses by railways is to be considered part of their business as carriers, and for their own convenience. It seems to be settled that the depositing of freight in their warehouses, at the time of receiving it, is to be so regarded, unless there are special directions given, and that the responsibility of the carrier attaches presently upon the delivery.¹³

§ 110. There is then no very good reason, as it seems to us, why the responsibility of the carrier should not continue, until the owner or consignee, by the use of diligence, might have removed the goods. The warehousing seems to be with that intent, and for that purpose. And if we assume, as we must, we think, that there is no obligation upon railway carriers to give notice of the arrival of the goods, there does still seem to be reason and justice in giving the consignee time and opportunity to remove the goods, by the exercise of the proper watchfulness, before the responsibility of the carrier ends. In the case of *Smith v. Nashua & Lowell Railway*,¹¹ it is held that there is no duty upon railway carriers to store goods, after the consignee has notice of their arrival, and reasonable time to remove them. Of course, then, there is no absolute duty to keep warehouses, provided the company choose to give notice of the arrival of goods, in every case, and suffer them to remain in their cars until the consignee has reasonable opportunity to remove them. It is only for their own convenience in keeping goods, to be carried, till the train is ready to depart, or after their arrival until the consignee has reasonable opportunity to remove them. After that there is no doubt the carrier's responsibility as such, ceases, and if the goods remain in the warehouse of the company, it is only with the responsibility of ordinary bailees for hire, as held

¹³ *Ante*, ch. ix., and cases cited; *McCarty v. New York & Erie Railw.*, 30 Penn. St. 247.

in *Norway Plains Co. v. Boston & Maine Railway*,¹⁰ or as was held in *Smith v. Nashua & Lowell Railway*,¹¹ with the responsibility of a bailee without compensation. The former degree of responsibility seems to us the just and reasonable one, as it is an accessory of the carrying business, and the carrier, after he becomes a warehouseman, is no doubt fairly entitled to charge, in that capacity. The omission to charge for warehousing in the first instance, being the result of the course of the business, and because it is a part of the carrier's duty to keep the goods safely till the consignee has opportunity, by the use of diligence, to remove them. And this seems to us the extent of the decision in *Thomas v. Boston & Providence Railway*.¹⁴ This point is there very distinctly stated, by *Hubbard, J.*: "And where such suitable warehouses are provided, and the goods, *which are not called for on their arrival at the places of destination*, are unladed, and stored safely in such warehouses, the duty of the proprietors, as common carriers, is, in our judgment, terminated."

§ 111. But when the same rule is applied to goods, arriving out of time, and before the consignee could have removed them, reason and justice seem to us to require that if the company put them into their warehouse, for their own convenience, their responsibility as carriers should not be thereby terminated, until the consignee has reasonable opportunity to remove them.¹⁵ We should

¹⁴ 10 Met. 472. In this case the action was for one roll of leather, out of four lost in the defendants' warehouse. The four rolls arrived upon the train, and were deposited in the warehouse. The freight was paid on the whole, and the whole pointed out to the teamster, who called for them at the depot, and he carried away but two of them. After this the loss occurred, and there could be no manner of doubt whatever that the goods were remaining in the warehouse for the convenience of the owner, and after a reasonable time for their removal had elapsed. There could be no question whatever that the decision is fully justified, and that it comes fairly within the principle of the case of *Garside v. Trent & Mersey Nav. Co.*, 4 T. R. 581, upon the authority of which it professes to go. See also *Hilliard v. Wilmington*, 6 Jones Law, 343.

¹⁵ *Michigan Central Railw. v. Ward*, 2 Mich. 538. In this case, notice of

therefore have felt compelled to rule the case of *Norway Plains Co. v. Boston & Maine Railway*, in favor of the

the arrival of the goods is held necessary to terminate the responsibility of the carrier. But the statute in this State provides, that the responsibility of the carrier shall cease, as such, after notice of the arrival of the goods a sufficient time to enable the consignee to remove them, and the court considered, that, by consequence, it will continue till that period. And in *Rome Railw. v. Sullivan*, 14 Ga. 277, the same rule in regard to notice is adopted upon general principles.

The former case was an action to recover the value of wheat carried, by the plaintiffs in error, from Kalamazoo to Detroit, and there destroyed by fire directly after it was received in their warehouse. The court acknowledge the general duty of carriers to make personal delivery to the consignee, and say: "But to this general rule there are many exceptions. With great force and reason the law implies an exception to that large class of common carriers whose mode of transportation is such as to render it impracticable to comply with this rule; it embraces all carriers by ships, and boats, and cars upon railways. These must necessarily stop at the wharves and depots on their respective routes, and consequently personal delivery would be attended with great inconvenience, and therefore the law has dispensed with it. But in lieu of personal delivery, which is dispensed with in this class of carriers, the law requires a notice, and nothing will dispense with that notice."

And in a late case in New Hampshire, which has come to hand since writing the foregoing, we understand the court to take precisely the same view stated in the text. The case is *Moses v. Boston & Maine Railw.*, 32 N. H. 523, and was, where a quantity of wool arrived at the company's station, the place of its final destination, about three o'clock in the afternoon. In the usual course of business, from two to three hours were required to unload the freight from the cars into the warehouse, and the gates were closed at five o'clock, so that no goods could be removed from the warehouse after this hour, until the next morning. During the night the warehouse and the wool therein were destroyed by fire.

It was held, that the responsibility of railway companies, as common carriers, for goods transported by them, continues until the goods are ready to be delivered at the place of destination, and the owner or consignee has had a reasonable opportunity, during the hours when such goods are usually delivered there, of examining them so far as to judge from their outward appearance whether they are in proper condition, and to take them away.

But it was held, that the consignee must take notice of the course of business at the station, and the time of the arrival of the train when his goods may be expected, and be ready to receive them in a reasonable time after their arrival, and when in such common course of business they may fairly be expected to be ready for delivery.

That upon the facts in this case the jury were warranted in finding that the consignee had not a reasonable opportunity to take the wool into his possession before the fire, and that defendants were liable therefor as common carriers, notwithstanding it might be proved by them, that, before the fire the wool had been

plaintiffs. But in justice to the very elaborate opinion of *Shaw*, Ch. J., who has perhaps no superior upon this continent, as a wise and just expositor of the law, as a living and advancing study, we shall give the substance of it in his own words.¹⁶ We may be allowed to say, that it seems

placed upon the platform in the warehouse from which such goods were usually delivered, separate from other goods, and ready to be delivered.

In this case, and in a case between the same parties (4 Foster, 71), it is held that the common-law liability of the carrier as to goods in his warehouse, before and after the transportation, cannot be restricted by a mere notice brought home to the knowledge of the owner.

While goods are in warehouse, after their arrival at their place of destination, and are carried away by some one by mistake, and without the fault of the company's agents, they are not liable. But if the company's agents deliver them, either positively or permissively, to the wrong person, by mistake, the company are liable. And they are *primâ facie* liable for non-delivery, and the burden of proof is upon them to show that the goods were lost without their fault, although they may not be able to show precisely the manner of the loss. *Lichtenhein v. Boston & Providence Railw.*, 11 Cush. 70. See *Mil. & Miss. Railw. v. Fairchild*, 6 Wis. 403.

In the case of *Chicago & Rock Island Railw. v. Warren*, 16 Ill. 502, it was held, that common carriers could not relieve themselves of their liability, as such, by depositing the goods in warehouse until this was evinced by some open and distinct act. As if the storage were to be in the car that must be separated from the train, and placed in the usual place for storage, in the care of a proper person, and that the proof of this change rested upon the carrier. *Scates*, Ch. J., says: "Goods may not be thrown down in a station-house or on a platform, at their destination, in the name and nature of delivery. The responsibility of the carrier must last till that of some other begins, and he must show it."

In *Crawford v. Clark*, 15 Ill. 561, it was held, that carriers by water, on landing goods, must give notice to the consignee or owner, and if he refuse to accept them, the carrier must safely secure them or he will be responsible for all loss or damage. And when the carrier had agreed to deliver goods in Pittsburgh, but kept them at his warehouse in Alleghany, to which he had removed some months before, as was the custom of the trade, until the aqueduct at Pittsburgh was completed, where the goods were destroyed by fire, without his fault, he was held responsible for the loss. *Gaff v. Bloomer*, 9 Penn. St. 114.

But where the carrier was directed to make sale of the goods at the point of destination, and after their arrival they were placed upon deck, exposed for sale, and while in that state a portion was stolen without the fault of the carrier, he was held not responsible. *Labar v. Taber*, 35 Barb. 305.

¹⁶ This action was to recover the value of two parcels of merchandise forwarded by plaintiffs to Boston, in cars of defendants. The goods are described in two receipts of defendants, dated at Rochester, N. H., one October 31, 1850, the other

to us, the opinion and argument of the learned chief justice might, for the most part, be quite as well applied to

November 2, 1850. The goods specified in the first receipt were delivered at Rochester, and received into the cars and arrived seasonably in Boston on Saturday, the 2d of November, and were then taken from the cars and placed in the warehouse of defendants; that no special notice was given to plaintiffs, or their agents, but that the fact was known to Ames, a truckman, who was their authorized agent employed to receive and remove the goods; that they were ready for delivery at least as early as Monday morning, the 4th of November, and that he might then have received them. The goods specified in the other receipt were forwarded to Boston on Monday, the 4th of November;— the cars arrived late. Ames, the truckman, knew, from inspection of the way-bill, that the goods were on the train, and waited some time, but could not conveniently receive them that afternoon in season to deliver them at the places to which they were directed, and for that reason did not take them. In the course of the afternoon they were taken from the cars and placed on the platform within the depot. At the usual time at that season of the year the doors were closed. In the night the depot was burned down, and the goods destroyed by an accidental fire. The fire was not caused by lightning, nor was it attributable to any default, negligence, or want of due care on the part of defendants or their agents. . . . The question is, whether, under these circumstances, defendants are liable for the loss of the goods.

“ If, on the contrary, the transit was at an end, if the defendants had ceased to have possession of the goods as common carriers, and held them in another capacity, as warehousemen, then they were responsible only for the care and diligence which the law attaches to that relation, and this does not extend to a loss by accidental fire, not caused by the default or negligence of themselves or their servants. The question then is, when and by what act the transit of the goods terminated. It was contended in this case, that in the absence of special contract, or evidence of a local usage, etc., to the contrary, the carrier of goods by land is bound to deliver them to the consignee, and that his obligation as carrier does not cease till such delivery. This rule applies very properly to the case of goods carried by wagons, and other vehicles traversing the common highways and streets, and which, therefore, can deliver the goods at the houses of the respective consignees. But it cannot apply to railroads whose line of movement and point of termination are locally fixed. The nature of the transportation, though on land, is much more like that by sea in this respect, that, from the very nature of the case, the merchandise can only be transported along one line and delivered at its termination, or at some fixed place by its side at some intermediate point. The rule in regard to ships is very exactly stated in the opinion of *Buller, J.*, in *Hyde v. Trent & Mersey Navigation Co.*, 5 T. R. 397: ‘ A ship trading from one port to another has not the means of carrying the goods on land, and according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carriers.’ The court are of opinion that the duty assumed by the railroad is — and this being known to owners of goods forwarded, must, in the absence of proof to the contrary, be presumed to be assented to by them, so as to constitute an implied contract between them, — that they will carry the

the rule for which we contend, as to have reached the result which it did.

goods safely to the place of destination and there discharge them on the platform, and then and there deliver them to the consignee or the party entitled to receive them; if he is then and there ready to take them forthwith, or, if the consignee is not then ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for. This, it appears to us, is the spirit and legal effect of the public duty of the carriers and of the contract between the parties when not altered or modified by a special agreement.' . . .

'This we consider to be one entire contract for hire, and although there is no separate charge for storage, yet the freight fixed by the company to be paid as a compensation for the whole service, is paid as well for the temporary storage as for the carriage. This renders both services, as well the absolute undertaking for carriage, as the contingent undertaking for storage, to be services undertaken to be done for hire and reward. From this view of the duty and implied contract of carriers by railroad, we think there result two distinct liabilities: first, that of common carriers, and afterwards that of keepers for hire, or warehouse-keepers, the obligation of each of which is regulated by law. We may say then, in the case of goods transported by railroad, either that it is not the duty of the company as common carriers to deliver the goods to the consignee, which is more strictly conformable to the truth of the facts, or, in analogy to the old rule that delivery is necessary, it may be said that delivery by themselves as common carriers to themselves as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers. If they are chargeable after the goods have been landed and stored, the liability is one of a very different character, one which binds them only to stand to losses occasioned by their fault or negligence.'

"Indeed the same doctrine is distinctly held in *Thomas v. Boston & Providence Railw.*, 10 Met. 472, with the same limitation. The point that the same company, under one and the same contract, may be subject to distinct duties for a failure in which they may be liable to different degrees of responsibility, will result from a comparison of the two cases of *Garside v. Trent & Mersey Navigation Co.*, 4 T. R. 581, and *Hyde v. Same*, 5 id. 389. See also *Van Santvoord v. St. John*, 6 Hill, 157; *McHenry v. Phila., Wil., &c. Railroad*, 4 Harring. 448." In the case of *In re Webb*, 8 Taunt. 443, which was where common carriers agreed to carry wool from London to Frome, under a stipulation that when the consignees had not room in their own store to receive it, the carriers without additional charge would retain it in their own warehouse until the consignor was ready to receive it, wool thus carried and placed in the carrier's warehouse was destroyed by an accidental fire, it was held that the carriers were not liable. The court say this was a loss which would fall on them as carriers, if they were acting in that character, but would not fall on them as warehousemen." . . . "This view of the law applicable to railroad companies as common carriers of merchandise, affords a plain, precise, and practical rule of duty, of easy application, well adapted to the security of all persons interested; it determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform, and if on account of their arrival in the night, or at any

§ 112. And where the consignee called for the goods after their arrival, and the station agent told him they were not there, and in consequence they were not removed, but were destroyed by fire the same night, it was held the company were liable.¹⁷

§ 113. And where the agent of the consignee requested the agent of the company to suffer the car in which was a block of marble, transported by them, to be removed to the depot of another railway, and he assented, and assisted in the removal of the car, and after the removal the agent of the consignee procured the use of the machinery of the second company to unload the block, which was broken through defect of such machinery, it was held the first company were not liable for such injury, and that their responsibility terminated when the marble was taken from their station, that being a virtual delivery to the consignee.¹⁸ And the responsibility of the carrier, as such,

other time when by the usage or course of business the doors of the merchandise depot or warehouse are closed, or for any other cause they cannot then be delivered, or if for any reason the consignee is not there ready to receive them, it is the duty of the company to store them safely under the charge of competent and careful servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them, and for the performance of these duties after the goods are delivered from the cars, the company are liable as warehousemen or keepers of goods for hire." . . . "It was argued in the present case that the railroad company are responsible as common carriers of goods, until they have given notice to the consignees of the arrival of the goods. The court are strongly inclined to the opinion, that in regard to the transportation of goods by railroads, as the business is generally conducted in this country, the rule does not apply. The immediate and safe storage of goods on their arrival in warehouses provided by the railroad companies, and without additional expense, seems to be a substitute better adapted to the convenience of both parties."

¹⁷ *Stevens v. Boston & Maine Railw.*, 1 Gray, 277.

¹⁸ *Lewis v. Western Railw.*, 11 Met. 509. And in *Kimball v. Western Railw.*, 6 Gray, 542, it was held that the company were liable for ordinary care and skill in unloading goods from their cars, even in cases where, by their regulations, it was made the duty of the consignees to unlade them within twenty-four hours after their arrival, and this was known to the consignee, who also had notice of the arrival of the goods more than twenty-four hours before the time of their being unloaded by the company's servants, and that if goods were, under

will not continue beyond a reasonable time to remove the goods, because he gives notice of the arrival, and requires the consignee to remove them within twenty-four hours,¹⁹ there being no obligation, as common carriers, either to give notice of the arrival or to keep the goods beyond the shortest convenient time after their arrival to enable the consignee to remove them.²⁰ And in the mean time, no distinct charge for warehousing could properly be made; but after the duty of the carrier is fully performed, and the goods are allowed to remain in the company's warehouse for any considerable time, there is no good reason why they may not charge for warehouse services.²¹ But the onus of proof is always upon the company to show that their responsibility as carriers had terminated before any loss or damage occurred.²² The charter of the Michigan Central Railway Company empowers them to charge storage on all goods suffered to remain at their stations more than four days after arrival, except in Detroit, where the time is limited to twenty-four hours, and the company are required to notify the consignee four days or twenty-four hours, in either case, before they charge storage, and the company are made responsible for goods awaiting delivery, as warehousemen, and not as carriers. It was held that property on de-

such circumstances, injured by the want of such care and skill, the company were liable.

And in the absence of all contract or usage for the consignee to unlade the goods from ships, boats, or cars, and especially where they are bulky, and of great weight, it seems reasonable that the carrier should assume the risk of unlading, under his responsibility as carrier. Such is the general course of the carrying business. The carrier is bound to provide himself with suitable and safe machinery for unlading, and where he used the machinery of third parties at his own suggestion for that purpose, he was held liable for its sufficiency. *De Mott v. Laraway*, 14 Wend. 225.

¹⁹ *Richards v. Michigan S. & N. Indiana Railw.*, 20 Ill. 404.

²⁰ *Porter v. Chicago & Rock Island Railw.*, 20 Ill. 407; *Davis v. Michigan S. & N. Indiana Railw.*, id. 412; *Illinois Central Railw. v. Alexander*, id. 23.

²¹ *Illinois Central Railw. v. Alexander*, *supra*.

²² *Wardlaw v. South C. Railw.*, 11 Rich. Law, 337.

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posit at their stations, was to be considered as awaiting delivery as soon as it was in a condition to be delivered to the consignee. The office of the notice is to fix the time for charging storage. It has no effect to extend the carrier's responsibility, as such, but does necessarily restrict it to the commencement of the duty as warehousemen, at the furthest.²³

§ 114. Questions of some difficulty often arise, in regard to the custody of goods in warehouse, at intermediate stations, where there is no connection between the different routes over which the goods pass. We shall see that the general duty, in such cases, in this country especially, is, to carry safely, and deliver to the next carrier upon the route.²⁴ But cases will occur where there will be delay in effecting the connection. In such cases there can perhaps be no better rule laid down than that found in the opinion of *Buller, J.*, in *Garside v. Trent & Mersey Navigation Company*,²⁵ which was a case precisely of this character. "The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods ; for when the voyage to Manchester is performed, it is the interest of the carrier to get rid of them directly ; and it was only because there was no person ready at Manchester to receive these goods that the defendants were obliged to keep them."

§ 115. But as a general rule, where the next carrier in the connection has a place of receiving goods, as in the case of railways, always open, and agents ready to receive them, it would probably be the duty of each preceding carrier to make immediate delivery at the place of receiv-

²³ *Michigan Central Railw. v. Hale*, 6 Mich. 243.

²⁴ *Post*, ch. xv., and cases cited. In *Converse v. Norwich & N. Y. Transp. Co.*, 33 Conn. 166, it was held that where the subsequent carrier uniformly received freight from the connecting line on a particular platform by the side of the line, a delivery at that point fixed the responsibility of that carrier, and discharged the former one.

²⁵ 4 T. R. 583. And in every case where a warehouseman or forwarding merchant ships goods, it is his duty to advise the consignee of it immediately. *Railey v. Porter*, 32 Mo. 471.

ing freight to the next succeeding carrier, in the line. And as this fixes, ordinarily, the carrier's liability,²⁶ in this mode a continuous liability of carriers is kept up throughout the line, which it seems to us is the true policy of the law upon this subject, where it can fairly be done, and without injustice to any particular carrier.

§ 116. Difficult questions often arise, too, in this connection, where the goods are directed, at an intermediate station in the course of their transit, to the care of persons who sustain the double capacity of forwarding merchants and carriers. In such cases they are more commonly held liable as carriers, the consignment being presumed to have been made to them in that capacity.²⁷

§ 117. And where a package delivered to a common carrier for transportation, is addressed to the care of the agent and principal representative of the carrier at the point where the carriage is to terminate, this will not make such agent the consignee of the goods, so as to terminate the carrier's responsibility upon delivery to him.²⁸

§ 118. And where goods have been tendered to the consignee and refused by him, there is no rule of law that the carrier is bound to give notice to the consignor; he is only bound to do what is reasonable, and that is a question for the jury under all the circumstances.²⁹

§ 119. In one case,³⁰ where the subject is very exten-

²⁶ *Ante*, § 98.

²⁷ *Teall v. Sears*, 9 Barb. 317. This case is where goods were shipped from Albany upon the canal, with the accompanying bill of lading: —

"Three cases of goods, A. B. Chase, Chicago, by vessel, care of Sears & Griffith, Buffalo," and were received at Buffalo by Sears & Griffith, who were principally employed in the commission and forwarding business, but had some slight interest in transportation on the lakes, west, and who forwarded these goods to Chicago, by a transient vessel. Suit being brought against them for one case of the goods which did not arrive, it was held that they were liable as carriers and not as forwarding merchants merely.

²⁸ *Russell v. Livingston*, 16 N. Y. 515.

²⁹ *Hudson v. Baxendale*, 2 H. & N. 575.

³⁰ *The Great Western Railw. v. Crouch*, 3 H. & N. 182; s. c., *post*, ch. xxiii., pl. 16, and note.

sively discussed in the Exchequer Chamber before all the judges, and where the opinions are delivered *seriatim* with but slight disagreement, a parcel was tendered to the consignee and not being accepted was sent back to the consignor without reasonable delay, as the jury found. About two hours after it was first tendered to the consignee, he called for it, and tendered all charges claimed, but was told it had been returned to the consignor. The jury found that the tender of the charge for the carriage was made within a reasonable time after the parcel had been refused. It was held that the carrier was liable for a breach of duty, even supposing his duty as carrier ended by the tender of the parcel. The judges here put stress upon the fact that the carrier should do what is reasonable in such cases, what will be most likely to be for the interest of the owner.

§ 120. It seems to be settled in the American courts, that where the consignee cannot be found or refuses to accept the goods, the carrier is not in general at liberty to abandon them or remove them to any remote place. He is bound to keep them as carrier, until the owner or consignee, by the use of diligence, has time to remove them, when his duty as carrier ceases.³¹ After that he is bound to keep them as a careful and prudent man would be likely to keep his own goods of the same class, and according to his means. It is not always that the carrier is provided with ample means of warehousing goods after his duty as carrier is ended. But he should do the best his means will enable him to do, and his means should be reasonable according to his usual business.³²

§ 121. There seems to be no question but that the carrier will be justified in putting goods not called for in a reasonable time where no duty of personal delivery or

³¹ *Ante*, § 110.

³² *Ostrander v. Brown*, 15 Johns. 39; *Hemphill v. Chenie*, 6 W. & S. 62; *Moses v. Boston & Maine Railw.*, 32 N. H. 523; *Smith v. Nashua & L. Railw.*, 7 Foster, 86; *Eagle v. White*, 6 Wharton, 505.

giving notice exists; and also such goods as are not accepted by the consignees, into warehouse. And this he may do in his own warehouse or that of others, according to the usual course of business at the point.³³

§ 122. If a carrier by water cannot find the consignee, or his agent, at the port of destination, he may exonerate himself from further responsibility, by delivery to a responsible warehouseman. And where this is done, the warehouseman paying all of the charges of the carrier, the intendment of law is, in the absence of all evidence to the contrary, that the bailment is made on behalf of the consignee, and it will be so regarded, even where the goods are never called for; and the carrier cannot reclaim the goods on repayment of the charges.³⁴

§ 123. In a recent English case, where cattle arrived at the point of destination on Sunday, and by law, could not be removed until after midnight, it was held, the responsibility as carrier ceased upon the arrival of the train, and placing the cattle in condition to remain, until they could be removed. *Martin, B.*, dissenting. Upon principle the law would seem to be with the dissenting judge, since the owner could not remove the goods until after midnight, and in the mean time the risk should fall upon the carrier, if there was no fault of the owner.³⁵

§ 124. The general principle, that the carrier's responsibility continues throughout the transitus, in all modes of transportation, is most unquestionable.³⁶ And in the early cases, where the consignees are not ready to accept,

³³ *Thomas v. Boston & Prov. Railw.*, 10 Met. 472; *Fisk v. Newton*, 1 Denio, 45; *McCarty v. New York & Erie Railw.*, 30 Penn. St. 247, 250; *Goold v. Chapin*, 10 Barb. 612; *Farmers' & M. Bank v. Champlain Transp. Co.*, 23 Vt. 186, 211; *Norway Plains Co. v. Boston & Maine Railw.*, 1 Gray, 263; *Chicago & Rock Island Railw. v. Warren*, 16 Illinois, 502; *Bansemer v. T. & W. Railw.*, 25 Ind. 434.

³⁴ *Hamilton v. Wilkinson*, 11 Allen, 308. If the carrier desire to make a bailment on his own behalf he should make it special.

³⁵ *Shepherd v. Bristol & Exeter Railw.*, Law Rep., 3 Exch. 189; *ante*, §§ 109, 110, and cases cited.

³⁶ *Coates v. Ralton*, 6 B. & C. 422; *Crawshay v. Eades*, 1 id. 181.

the precise point of termination is fixed at the moment when the crane of the warehouseman is attached to raise the goods into the warehouse.³⁷

§ 125. It has been held that the carrier cannot excuse himself for non-delivery of the goods, on the ground of unlawful seizure of the same by government officers,³⁸ nor on the ground of an invalid claim of lien.³⁹ Nor will a lawful seizure and condemnation by the courts of a foreign country be any excuse to the carrier, the owner not being in fault.⁴⁰

§ 126. Delivery to the consignee must be according to the course of business and the usages of the trade at the port of destination. It may be by delivery on board the lighter,⁴¹ or by depositing the goods on the wharf of the warehouseman, wharfinger, or of the consignee or owner.⁴² But a delivery or tender of the goods must be in a reasonable time, place, and manner, of which the jury are the judges.⁴³ And if goods are tendered after the close of business hours, or when the owner cannot receive them, the carrier is not thereby released.⁴⁴

§ 127. But if goods are tendered in proper time, place, and manner, to the owner or consignee and refused, the carrier is released, as such, and is thereafter only responsible as an ordinary bailee. And it will not prevent this result, that the tender is made on a fast day, appointed by the Governor of the State, it not being made a public holiday by the laws of the State.⁴⁵

³⁷ *Thomas v. Day*, 4 Esp. 262; *Quiggin v. Duff*, 1 M. & W. 174.

³⁸ *Gosling v. Higgins*, 1 Camp. 451.

³⁹ *Stoer v. Crowley*, M'Clel. & Y., 136. If the carrier offer the goods at the house of the consignee, and is compelled to carry them back to the warehouse because the hire is not ready to be paid, he may treat his responsibility, as carrier, as terminated. But if both parties treat it as continuing until actual delivery, he is responsible until that event, in his capacity of carrier. *Ib.*

⁴⁰ *Spence v. Chodwick*, 10 Q. B. 517; *Atkinson v. Ritchie*, 10 East, 530.

⁴¹ *Strong v. Nataly*, 1 Bos. & Pul. (N. R.) 16.

⁴² *Blin v. Mayo*, 10 Vt. 56.

⁴³ *Hill v. Humphreys*, 5 Watts & S. 123; *Segura v. Reid*, 3 La. Ann. 695.

⁴⁴ *Hatham v. Ely*, 28 N. Y. 78.

⁴⁵ *Richardson v. Goddard*, 23 How. (U. S.) 28.

§ 128. But any reasonable arrangements between the carrier and the consignee as to the mode of delivery, will be held binding, and the carrier exonerated by delivery in the mode thus stipulated.⁴⁵ And he will be held responsible for any injury to the goods resulting from not delivering in conformity with the arrangements.⁴⁶

§ 129. It seems to be the settled rule, in regard to carriers by water, that they must make delivery at the proper wharf, and either give notice to the owner or consignee, in time to enable him to take charge of the goods, or else put them in safe custody and warehouse, so that they can be safely preserved, until the person interested can remove them, or assume charge himself.⁴⁷ And it will not excuse the carrier, that the master of the vessel wrongfully refused to sign bills of lading, and is therefore ignorant of the names of the consignees,⁴⁸ or that, for any other reason, the carrier is ignorant of the names or residence of the consignees.⁴⁹ But this general rule will be controlled by the express direction of the consignor,⁵⁰ and by the custom of the trade, or the usage of the particular place, but that should very distinctly appear; otherwise, the general reasonableness of the rule, that timely notice shall be given the consignees, or else the goods put in safe condition to remain until called for, will prevail.

§ 130. And it has been held by the English courts, that the carrier by railway has no right to impose a charge for the conveyance of goods to and from the station, where the customer does not require such service to be performed by him.⁵¹

⁴⁶ *The Grafton*, 1 Blatch. C. C. 173.

⁴⁷ *The Peytona*, 2 Curtis, C. C. 21; *Scholes v. Ackerland*, 15 Ill. 474; *Segura v. Reed*, 3 La. Ann. 695; *Herman v. Goodrich*, 21 Wisc. 536.

⁴⁸ *The Peytona*, *supra*.

⁴⁹ *Galloway v. Hughes*, 1 Bailey, 553.

⁵⁰ *Ide v. Sadler*, 18 Barb. 32.

⁵¹ *Garton v. Bristol & Exeter Railw. Co.*, 6 C. B. (N. S.) 639. See also *Ransome v. Eastern Counties Railw. Co.*, 1 C. B. (N. S.) 437, 2 Law T. (N. S.) 376; s. c. 6 Jur. (N. S.) 908.

§ 131. The English statute prohibiting carriers from making any discrimination for or against any of their customers, will not allow them to keep their goods' station open for the delivery of goods after their usual time of closing it, as to other persons,⁵¹ or of carrying for particular ones who have large amounts of freight, at prices below their usual rate.⁵¹

CHAPTER XI.

PAYMENT OF FREIGHT. — GENERAL DUTY OF CARRIERS. — EQUALITY OF CHARGES. — SPECIAL DAMAGE.

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| <p>§ 132. <i>Bound to carry for all who apply.</i></p> <p>§ 133. <i>May demand freight in advance.</i>
<i>Refusal to carry excuses tender.</i></p> <p>§ 134. <i>Payment of freight and fare will</i>
<i>sometimes be presumed.</i></p> | <p>§ 135. <i>What will excuse carrier from carry-</i>
<i>ing, or delivery.</i></p> <p>n. 15. <i>Equality of charges.</i></p> <p>§ 136. <i>Goods may be rated according to custom.</i></p> <p>§ 137. <i>Must carry in the order of receipt.</i></p> |
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§ 132. It is a well-settled principle of the law applicable to common carriers, both of goods and passengers, that they are bound to carry for all persons who apply, unless they have a reasonable excuse for the refusal to do so.¹ Carriers of goods and passengers, who set themselves before the public as ready to carry for all who apply, become a kind of public officers, and owe to the public a general duty, independent of any contract in the particular case.²

§ 133. The carrier is entitled to demand his pay in advance, but, if no such condition is insisted upon at the time of the delivery of the goods, the owner is not obliged to tender the freight, nor in an action is it necessary to allege more than a willingness and readiness to pay a reasonable compensation to the carrier.³ Where one is bound to per-

¹ *Benett v. Peninsular Steamboat Co.*, 6 C. B., 775; *Story on Bail*, § 591; *Jencks v. Coleman*, 2 Sumner, 221, 224. But a carrier from one place to another is not bound to carry between intermediate places. *Thurman v. Wells*, 18 Barb. 500.

² *Bretherton v. Wood*, 3 Brod. & B. 54; s. c., 9 Price, 408.

³ *Bastard v. Bastard*, 2 Shower, 81. It is here said, "For perhaps there was no particular agreement, and then the carrier might have a *quantum meruit* for his hire." *Lovett v. Hobbs*, id. 129, and notes; *Rogers v. Head*, Cro. Jac. 262. *Jackson v. Rogers*, 2 Shower, 327, decides the general principle of the carrier being liable to an action if he refuse to carry goods, "though offered his hire" if

form, upon payment, even though entitled to demand payment in advance, a refusal to perform the act excuses any tender of the compensation. All that is necessary to be averred or proved in such case is a willingness and readiness to pay when the other party is entitled to demand pay, which, in the case of the carrier, is not till he accept the goods and assume the duty of his office.⁴ When, accordingly to the common course of business, carriers do not require pay in advance, freight is not expected to be paid, unless required, in advance, and the omission will not excuse the carrier, in such cases. Indeed, in one case it was held that the carrier could not rid himself of his common-law liability by waiving compensation, where the right to demand it existed.⁵ But, where freight is actually paid in advance, it would seem that the last carrier should not be allowed to insist upon any charge beyond the amount paid. But where a less sum than the regular tariff is paid, and the last carrier is required to advance for former freight a sum, which, together with his own, exceeds that which had been paid, it was held he might demand the balance before surrendering the goods.⁶

“he had convenience to carry the same,” which seems to presuppose that both are conditions of the liability. *Pickford v. The Grand Junc. Railw.*, 8 M. & W. 372; *Galena & Chicago Railw. v. Rae*, 18 Ill. 488. Where payment has been made in advance, it cannot be required to be paid over again to another party, who has carried the goods without authority. But where payment is not made in advance to the first carrier and he employs a second, the latter has a lien on the goods for his charges. *Nordemeyer v. Loescher*, 1 Hilton, 499.

It is said in *Skinner v. Chicago & Rock Island Railw. Co.*, 12 Iowa, 191, that a railway company has the right to require a receipt of the consignee showing that the goods were in good order when delivered, and that the consignee has an equal right to examine the goods before executing the receipt, and that such examination should be made at the place of delivery and before removal. But the ordinary receipt upon the books of the express company required by the agent at the very moment of delivery, without giving any opportunity for inspection, could have no implication against the owner for a subsequent claim for damages by reason of the default of the company.

⁴ *Rawson v. Johnson*, 1 East, 203; 2 Kent, Comm., 598, 599, and note.

⁵ *Knox v. Rives*, 14 Alabama, 249, 261, opinion of court, by *Chilton, J.*

⁶ *Wells v. Thomas*, 27 Mo. 17.

§ 134. It is said that payment of fare will be presumed to have been made according to the common course of business upon the route.⁷ And, although this has been questioned,⁸ it is certain that such an inference, as matter of fact, will be very obvious, in the case of passengers upon railway trains, and we do not perceive any reasonable objection to the rule as one of presumption of fact, which for its force must depend upon circumstances, to be judged of by the jury.

§ 135. As before stated, a carrier is not bound to receive goods which he is not accustomed to carry, or when his means of conveyance are all employed, or before he is ready to depart,⁹ or where the property is publicly exposed to the depredations of the mob,¹⁰ or where the goods are not safe to be carried.¹¹ So, too, the carrier may excuse himself by showing that the loss happened through the fraud or negligence of the owner of the goods in packing, or otherwise, or from internal defect, without his fault.¹²

⁷ *McGill v. Rowand*, 3 Penn. St. 451.

⁸ 1 *Parsons on Cont.*, 649; *ante*, § 74.

⁹ *Arguendo*, in *Lane v. Cotton*, 1 Ld. Ray. 652; *Morse v. Slue*, 1 Ventris, 190, 2 Lev. 69. But if he do accept the delivery he is liable as a common carrier. *Barclay v. Cuculla-Y-Gana*, 3 Doug. 389; *Wibert v. N. Y. & Erie Railw.*, 19 Barb. 36.

¹⁰ *Edwards v. Sheratt*, 1 East, 604. And it was held erroneous, to instruct the jury, that press of freight will not, in ordinary times, excuse the carrier, being a railway company, from carrying freight forward without delay, where such press had existed for a long time and was not notified to the consignee. *Peet v. Chicago & N. W. Railw.*, 20 Wisc. 594.

¹¹ Eng. Stat. 8 & 9 Vict. c. 20, § 105. See also *Story on Bailments*, § 328; 2 *Kent, Comm.*, 599; *Hodges on Railways*, 613; *Angell on Carriers*, § 125.

¹² 2 *Greenleaf, Ev.*, 214; *Leech v. Baldwin*, 5 Watts, 446. *Coxe v. Heisley*, 19 Penn. St. 243, is where the owner represented the goods to be of much less value than they were, and thereby induced the carrier to exercise less watchfulness in regard to them. *Relf v. Rapp*, 3 Watts & S. 21, is a similar case, where a box of jewelry was put in an ordinary box and marked as glass, and the court held the misrepresentation such a fraud as to excuse the carrier from his common-law liability, even in the case of embezzlement by his servants.

But where goods are directed to be carried in a particular manner or position, the carrier is bound to regard the direction, and he is liable for all damage resulting from his neglect to do so. *Sager v. Portsmouth Railway*, 31 Maine, 228.

As, where a box containing a bottle of oil of cloves was marked "Glass with

So, where one who was bailee of goods to book them with the defendants, stage proprietors and common carriers of parcels, to carry to London, instead of doing so, put them in his own bag, which the defendants lost, it was held he could not recover the value of the parcel.¹³ So, too, if the loss happen partly through the negligence of the owner, and partly through that of the carrier, he is not liable unless, perhaps, where the owner's negligence is not the proximate cause of the loss.¹⁴ The carrier cannot refuse to carry a parcel because the owner refuses to disclose the contents. If accustomed to carry parcels, a carrier is bound to carry packed parcels (which is a bundle made up of smaller ones), according to the terms of the English statute.¹⁵

care — this side up," — and was lost by disregarding the direction, it was held, this was a sufficient notice of the value and of the contents. *Hastings v. Pepper*, 11 Pick. 41; *post*, ch. xxi.

¹³ *Miles v. Cattle*, 6 Bing. 743.

¹⁴ *Davies v. Mann*, 10 M. & W. 546; *Robinson v. Cone*, 22 Vt. 213, and cases referred to in the opinion of the court.

¹⁵ *Crouch v. The Great N. Railw.*, 9 Exch. 556; 25 Eng. L. & Eq. 449. By the 13 & 14 Vict. c. 61, § 14, it is provided that railway companies may make such charges as they may think fit, upon small parcels not exceeding 500 lbs. weight, provided that packed parcels forming an aggregate of more than 500 lbs. shall not come under this provision, but it shall apply only to single parcels in separate packages. Under this and similar English statutes it has been held, that if the packages are separate enclosures, although sent upon the same train and of the same kind enough to exceed the weight of 500 lbs., they may still be charged as parcels at any rate the companies may fix upon, which shall be uniform to all. *Parker v. Great Western Railw.*, 6 E. & B. 77; 34 Eng. L. & Eq. 301. By the English statutes, which limit the tonnage rates for railway transportation according to distance, and which are required to be uniform to all, the company may still charge something reasonable in addition, for loading and unloading the goods, when they perform that service. *Parker v. G. W. Railw.*, *supra*. And in the same case it is held that the company may make a reasonable allowance to persons or companies for collection and delivery of goods at stations or to consignees, when that is part of their undertaking, without infringing the statute requiring uniformity of rates of charges. This subject is somewhat elaborately discussed by the Court of Exchequer, in *Crouch v. The Great Northern Railw.*, 9 Exch. 556, 34 Eng. L. & Eq. 573, and the cases bearing upon the point, extensively referred to. The only point really decided there is, that it is a question of fact, whether one kind of goods or one kind of package is attended with more risk to the carrier than another.

§ 136. Where goods differ, in some essential particulars, from the general character of advertised freight, and are

The question here was between packed parcels, the mass being addressed to one person, and the separate parcels intended for different persons, and "Enclosures" containing several parcels for the same person. The jury found there was no substantial difference in the risk. See also *post*, ch. xxxv., and *Pickford v. Grand Junction Railw.*, 10 M. & W. 399; *Parker v. Great Western Railw.*, 11 C. B. 545, and 8 Eng. L. & Eq. 426; *Edwards v. Great Western Railw.*, 11 C. B. 588; 8 Eng. L. & Eq. 447. An opinion is here intimated (*Crouch v. Great N. Railw.*), that an express carrier, or collector and carrier of parcels, might recover special damage of a railway company who, by failure to perform their duty promptly, should injure his business. And *Hadley v. Baxendale*, 9 Exch. 341; 26 Eng. L. & Eq. 398, is cited in confirmation of the claim. But it was considered that the declaration did not cover the claim. The rule in regard to special damages is very correctly defined in *Hadley v. Baxendale*, so far as carriers are concerned. It is there held that, if the carrier is aware of the circumstances of the employer and the extent of the injury likely to occur by delay, and is still culpable, thereby causing delay, he must make good the special damage. But if he is not aware of any unusual circumstances whereby special damages are likely to occur, he is only liable to such general damages as may be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of a breach of it. As, where a miller sent a shaft to be used as a model for casting a new one, and the carrier unreasonably delayed the delivery of it, and consequently the return of the new one, and the plaintiff's mill, in the mean time, remained idle in consequence, none of these circumstances being known to the carrier, it was held the plaintiff could not recover special damage by reason of his mill remaining idle, and that it was the duty of the judge, in trying the case, to lay down a definite rule by which the jury shall estimate the damages, and to enable the judge to do so the full court should determine that rule. *Blake v. Midland Railw.*, 18 Q. B. 93; 10 Eng. L. & Eq. 437; *Alder v. Keighly*, 15 M. & W. 117; *post*, ch. xxxiv., n. 2.

In a recent and important case in the House of Lords, *Finnie v. Glasgow & Southwestern Railw.*, 2 McQueen's H. of L. 177; 34 Eng. L. & Eq. 11, the subject of inequality of railway charges, for freight, is learnedly discussed by Lord Chancellor *Cranworth* and Lord *St. Leonards*, two of the most learned and experienced lawyers in England, and the surprising diversity of opinion between them upon a subject which, to common apprehension, seems not very difficult of solution, is another confirmation, if any were required, of the necessity of continued discussion in regard to the application of the most familiar principles of the law. In this case, the defendants leased a branch line upon which the plaintiff, a coal-owner, resided. The statute applicable to the subject provided, that the rates should be made equal to all persons in respect of goods passing over the same portion of, and over the same distance along, the railway, and under like circumstances; and that no reduction or advance should be made, partially, either directly or indirectly, in favor of or against any particular person. The rates of charge were higher upon the branch than upon the main line, for the same distance.

usually subjected to a specific rate, the carrier will be entitled to so charge.¹⁶

When the plaintiff sent his coals along the branch he was charged the branch rates; but when they reached the main line, then at the main-line rates. When coal-owners, living on the main line, sent their coals from the main line upon the branch, they were charged for the whole distance upon both lines, the main-line rates. Held [the two lords differing in opinion], that this was no violation of the equal rates clause in the statute. But it was held by Lord *St. Leonards* that it was a gross violation of such clause. It was doubted by the House, and by *Cranworth*, Lord Chancellor, whether, when one is overcharged in violation of this clause, the money can be recovered back by the party thus overcharged. But Lord *St. Leonards* was clearly of opinion it may be. If it were not for the doubt and the difference of opinion here, and the decision, one could entertain no serious question of the entire soundness of the opinions expressed by Lord *St. Leonards*.

A railway company cannot discriminate in their rates between goods carried partly by water and partly by railway and those carried exclusively by railway. *Ransome v. Eastern Counties Railw.*, 1 C. B. (N. S.) 437; s. c., 4 id. 135. But it was said in this case, which is also reported in 38 Eng. L. & Eq., 232, that in determining whether a railway company has given undue preference to a particular person, the court may look at the fair interests of the company itself, and entertain such questions, as whether the company might not carry larger quantities, or for longer distances, at lower rates per ton, per mile, than smaller quantities, or for shorter distances, so as to derive equal profits to itself. This latter principle is reaffirmed in *Ransome v. Eastern Counties Railw.*, 31 Law Times, 72, on appeal. And a railway company who advertised for carrying a certain description of goods, at a lower rate of charge, when sent through certain agents, were restrained by injunction from making any such discrimination. *Baxendale v. The North Devon Railw.*, 3 C. B. (N. S.) 324. Nor can the railway companies, under the English statutes prohibiting undue preferences, so arrange their tariff in regard to certain commodities as to annihilate the effect of distance of transportation with dealers in those commodities in different localities. *Ransome v. Eastern Counties Railw. Co.*, 4 C. B. (N. S.) 135.

And where the proprietor of coal mines was about to construct a railway for the accommodation of the lessees, and abandoned the purpose upon the public railway entering into an agreement to carry the coal from his pits at a reduced rate of charge from what others were required to pay from the same station for the same route, it was held to be an undue preference. *Harris v. C. & W. Railw.*, 3 C. B. (N. S.) 693. But a railway company is justified in carrying goods at a less rate of charge for one person than that at which they carry the same description of goods for another, if there be circumstances which render the cost to the company less. *Oxlade v. Northeastern Railw.*, 40 Eng. L. & Eq., 234; s. c., 1 C. B. (N. S.) 454. But a railway company cannot demand the statutory toll and something more for services performed, accommodation afforded, and expenses and risk incurred in and about the receiving, loading, and unloading and delivering the goods—that being a part of the consideration of the toll. *Pegler*

¹⁶ *Lamar v. N. Y. & Savannah S. S. Co.*, 16 Ga., 558.

§ 137. A railway company is bound to receive and carry freight in the order in which it is offered at the particular

v. Monmouthshire R. & Canal Co., 6 H. & N. 644. Nor can the company charge, in addition to the regular transport of the goods, for collecting or delivering the goods when such services were not performed; and such charges, if paid under protest, may be recovered of the company. *Garton v. B. & E. Railw. Co.*, 1 El. B., & S. 112; s. c., 7 Jur. (N. S.) 1234. The subject of excessive charges for packed parcels is here presented and discussed in various forms, and the excess of legal charge held recoverable of the company. See also *Baxendale in re*, 11 C. B. (N. S.) 787; *Baxendale v. West Midland Railw. Co.*, 8 Jur. (N. S.) 1072; s. c., 3 Giff., 650; *Same v. Great Western Railw. Co.*, 14 C. B. (N. S.) 1; See 2 Jur. (N. S.) 1174; *Same in re*, 12 C. B. (N. S.) 758; *Baxendale v. Great Western Railw. Co.*, in Exchequer Chamber, 10 Jur. (N. S.), 496; 16 C. B. (N. S.) 137.

But in a recent case (*Baxendale v. Eastern Counties Railw.*, 4 C. B. (N. S.) 63) it was held, that a railway company were not bound to carry parcels directed to different persons, but delivered to them at the same time, and all to be redelivered to the same person, at the place of destination, at the same rate as if directed to one person only. The plaintiffs were carriers who collect parcels from different persons to be forwarded by them through the railway, to be distributed, on their arrival, to the persons to whom directed. For these parcels, having such direction upon them, and no common mark, and not packed together, the company charged the same rate as for small parcels delivered by different persons, and not at the lower tonnage rates charged for heavy goods or parcels packed and directed to the same consignee; and it was held, that the charge was not unreasonable, inasmuch as the parcels, having nothing upon them to show that they were for the same consignees, might impose additional trouble upon the company. Although carriers are limited to a reasonable charge, there is no common-law obligation on a carrier to charge equal rates of carriage to all his customers. *Ib.* Nor does the statute apply where the carriage is from a point out of England to a point within, being partly by steamboats and partly by railway. *Branly v. Southeastern Railw. Co.*, 12 C. B. (N. S.) 63; s. c., 9 Jur. (N. S.) 329.

Railway companies may discriminate by classes, in regard to freight or passengers, but their charges must be uniform to all persons; but they may, nevertheless, change their rates from time to time. *Chicago, Burlington, & Quincy Railw. v. Parks*, 18 Ill. 460.

But a company are not bound to issue season tickets at equal prices over equal distances upon their route. *Jones v. Eastern Counties Railw. Co.*, 16 C. B. (N. S.) 718.

A railway company is not guilty of unjust discrimination by reason of charging more for several parcels, where they are directed to different persons, than if they were all addressed to the same person. *Baxendale v. Eastern Counties Railw.*, 4 C. B. (N. S.) 63. But where the company had been accustomed to unload goods transported by them, and place them upon the wagons of those carriers to whom they were consigned, without additional charge, but discontinued the practice as to all but Messrs. Pickford, to whom a comparatively small quantity came, the court considered that they could not, under Lord *Campbell's* act, re-

station and not with reference to all the stations on the road; and the rolling stock should be distributed to the

quire them to extend the same favor to other carriers, whose business was very much more extensive, that being more than the party was entitled to claim. But said, in giving judgment, that the plaintiff was not without just ground of complaint in regard to the greater facilities afforded other carriers, and if the plaintiff had urged this specific ground of complaint, both to the company and before the court, they would even have modified the written information to meet the justice of the demand, and might do the same thing upon the renewal of the complaint and refusal of the company to comply with it. *Cooper v. London & Southwestern Railw.*, 4 C. B. (N. S.) 738. -.

By the construction of the English statute railways are limited to a reasonable charge, and to all parties at the same rate, in the transportation of parcels of less than one hundred pounds weight, and it was therefore considered that they could not make an increased charge in respect of packed parcels, if they were not subjected to any additional risk and expense on that account. *Piddington v. South-eastern Railw. Co.*, 5 C. B. (N. S.) 111.

It is not competent for a railway company in England, under the English Railway Traffic Act, to carry for one person at a rate below their ordinary charge, because that person will, on that account, stipulate to employ them in other transportation wholly distinct and independent. And it is competent for the courts to enjoin any such preference, although it may be granted for an equivalent advantage by the company. *Baxendale v. Great Western Railw.*, 5 C. B. (N. S.) 309; *Id.* 336.

This question is discussed very much at length in the two last cases, occupying a large space in the reports. The complainants had derived their profits altogether from the charge for collecting the goods to be carried on the railway, and the company raised their price so as to embrace the charge for collecting, and gave notice that they would bring the goods to their stations without charge, thereby creating a monopoly of that portion of the business, which the court regarded as giving themselves an undue preference in regard to it.

But in *Nicholson v. Great Western Railw.*, *id.* 366, it was decided that it was competent to a railway company to enter into special agreements whereby advantages may be secured to individuals in the carriage of goods upon the railway, where it is made clearly to appear that in entering into such agreements the company have only the interests of the proprietors and the legitimate increase of the profits of the company in view, and that the consideration given to the company in return for the advantages afforded by them is adequate, and the company are willing to afford the same facilities to all others upon the same terms. And this may consist in a guaranty of large quantities and full train loads, at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guaranty. The company have no right, as already stated, to impose upon a customer a charge for conveying goods to and from their station if he does not require such service to be performed by them. *Garton v. Bristol & Exeter Railw.*, 6 C. B. (N. S.) 639. And it is an undue preference to allow one carrier to the railway

several stations with reference to the amount of business done at each.¹⁷ The refusal of a common carrier to carry for a particular consignee, is a breach of duty towards the consignor, and he should bring the action.¹⁸

to unload his goods regularly at a later hour in the day than the station is open to other carriers, or to fix a uniform rate for the transportation of different classes of freight below the average of the customer's business, it not appearing that this diminished charge was justified by any special circumstances of advantage to the company, independent of special favor to this party. 1b.

The omission by a railway company of a public duty, as not keeping the water of such depth about their dock as to allow the approach of ships, although done to gain a business advantage over ship transportation, is not a matter to be redressed by injunction under the Railway Traffic Act, it being subject to redress by mandamus or indictment. *Bennett v. Manchester, Sheffield, & Lincoln. Railw.*, 6 C. B. (N. S.) 755.

The doctrine of the case of *Nicholson v. Great Western Railw.*, *supra*, is reaffirmed in 7 C. B. (N. S.) 707.

¹⁷ *Ballentine v. Western Mo. Railw.*, 40 Mo. 491.

¹⁸ *Lafarge v. Harris*, 13 La. Ann. 553.

CHAPTER XII.

NOTICE OR EXPRESS CONTRACT RESTRICTING CARRIERS' RESPONSIBILITY.

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| <p>§ 138. <i>Special contract, limiting responsibility, valid.</i></p> <p>§ 139. <i>Notice, assented to by consignor, has same effect.</i></p> <p>§ 140. <i>But as matter of evidence, it is received with caution.</i></p> <p>§ 141. <i>Carrier must show that consignor acquiesced in notice.</i></p> <p>§ 142. <i>Decided cases. Carriers' Act.</i></p> <p>§ 143. <i>New York courts held, at one time, that express contract will not excuse the carrier.</i></p> <p>§ 144. <i>American cases generally hold notice, assented to, binding.</i></p> | <p>§ 145. <i>But in New Hampshire, knowledge of such notice is not sufficient to bind the owner.</i></p> <p>§ 146. <i>Will not excuse for negligence.</i></p> <p>§ 147. <i>Cases in Pennsylvania.</i></p> <p>§ 148. <i>General result of all the cases.</i></p> <p>§ 149. <i>The rule under the English statute stated and illustrated.</i></p> <p>§ 150. <i>Different modes in which the carrier may waive his own notices.</i></p> <p>§ 151. <i>Notice of one kind will not excuse from responsibility of another.</i></p> |
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§ 138. THE effect of special or general notices in restricting the general liability of carriers, is one of vast importance, and has created a great deal of discussion. We should scarcely be expected to go into the full detail of the whole subject, but we shall state the points established by the better-considered cases upon the subject. It was never made a serious question, in the English law, since the case of *Southcote*, 4 Co. 83, that any bailee might stipulate for an increased or a diminished degree of responsibility from that which the law imposed upon his general undertaking.

§ 139. And, upon principle, it is difficult to distinguish between an express contract, exonerating the carrier from his ordinary responsibility, and a notice from the carrier that he would not assume such responsibility, brought home and assented to by the owner of goods delivered to be carried. For as the carrier may refuse to carry, and

thus subject himself to an action for damages, he may equally, it would seem, undertake to carry upon such terms as his employers are willing to negotiate for, so that, upon principle, a notice brought home to the owner of the goods and assented to, is neither more nor less than a special contract.

§ 140. But a notice, brought home to the owner of the goods as evidence, merits a very different consideration, in this species of bailment, from any other, where there is no obligation upon the bailee to assume the duty. In the case of a carrier, with whom it is not optional altogether whether to carry goods offered or not, but where he must carry such goods as he is accustomed to carry, upon the general terms of liability imposed by the law, or submit to an action for damages, and where every one, desiring goods carried, has the option to have them carried without restriction of the carrier's duty, unless he choose to waive some portion of his legal rights, for present convenience or ultimate peace; the mere fact of such a notice, restricting the carrier's liability, being brought home to the knowledge of the owner of goods, before or at the time of depositing them with the carrier, is no certain ground of inferring whether the carrier consented to recede from his notice and perform the duty which the law imposes upon him, or the owner of the goods consented to waive some portion of his legal rights.

§ 141. Perhaps, upon general grounds of inference, it might be regarded as more logical and more reasonable to infer, that the carrier receded from an illegal pretension, than the owner of the goods from a legal one. At all events, to exonerate the carrier from his general liability, he must show, at the least, it would seem, that the owner assented to the demands of the notice, or acquiesced in it, by making no remonstrance.

§ 142. It will be found that the decided cases mainly

coincide with these general propositions.¹ The English statute, the Carriers' Act,² requires the owner of goods of great value, in small compass, enumerated in the act, which is very extensive, to declare to the carrier, at the time of delivery, the contents of the parcels, and pay the requisite price, or the carrier is exonerated from liability.

§ 143. In the State of New York the courts at one time held, that it is not competent for carriers to exonerate themselves from their general liability, either by notices brought home to the owner of goods, at the time they are deposited for carriage, or by express contracts to that effect even.³

¹ *Nicholson v. Willan*, 5 East, 507, is one of the earliest cases, where the mere fact of notice is treated as equivalent to an express contract, and this is upon the presumption that it was assented to by the owner of the goods, who seems to have been present at the time the goods were deposited, and to have been made aware of the notice. Nothing is said of any remonstrance upon his part. This notice, it will be observed, is only that packages above the value of £5 must be disclosed and insured as such. This notice seems nothing more than a regulation of their business, to enable them to know the value of their parcels, and to demand pay accordingly, which all carriers may now do, by statute in England, and in this country by general usage. See also *Reynold v. Waterhouse*, 1 M. & S. 225; *Catley v. Wintringham, Peake*, 150; *Cobden v. Bolton*, 2 Camp. 108.

In *Riley v. Horne*, 5 Bing. 217, Ch. J. Best shows, very conclusively, the reasonableness and justice of allowing carriers to require, by general notices, of those who bring goods or parcels, to disclose the contents, and to demand pay in proportion to their value, by way of insurance. *Wyld v. Pickford*, 8 M. & W. 443, seems to decide the same. And it seems especially reasonable that where the owner of the goods, being aware of the notice of the carrier that he will charge a higher price for valuable goods, does not disclose the value, in order to save expense, he should have no claim for any loss without the fault of the carrier. *Clay v. Willan*, 1 H. Bl. 298; *Izett v. Mountain*, 4 East, 370. See also *Gordon v. Ward*, 16 Mich. 360.

² 11 George IV. & 1 Will. IV. ch. 68.

³ *Cole v. Goodwin*, 19 Wend. 251; *Hollister v. Nowlen*, 19 Wend. 234; *Gould v. Hill*, 2 Hill, 623. But see also *Fish v. Chapman*, 2 Kelly, 349; *Jones v. Voorhies*, 10 Ohio, 145; *Dorr v. The N. J. Steam Nav. Co.*, 1 Kernan, 491. The New York courts seem to have adhered to the case of *Hollister v. Nowlen*. *Cam. & Am. Railw. v. Belknap*, 21 Wend. 354; *Clark v. Faxton*, id. 153; *Alexander v. Greene*, 2 Hill, 9; 7 id. 533; *Powell v. Myers*, 26 Wend. 594. But the case of *Gould v. Hill*, in which it was held that the carrier could not exonerate himself from his common-law responsibility, by a special contract, has been deliberately disregarded in two cases: *Parsons v. Monteith*, 13 Barb. 353; *Moore*

§ 144. But most of the American cases admit that carriers may restrict their general liability, by notices brought

v. Evans, 14 Barb. 524. And in *Morris v. Bay State etc.*, 4 Bosw. 225, it was held that if the carrier may limit the extent of his responsibility by express contract, he cannot by mere notice. In the *Western Transportation Co. v. New Hall*, 24 Ill. 466, it was held, that carriers cannot restrict their common-law responsibility by notice brought home to the owner of the goods, unless the same is assented to in express terms by such owner; and when any risks are excepted in the bill of lading, it is incumbent upon the carrier to prove that the loss resulted from such risks. So also in *Edwards v. Cahawba*, 14 La. Ann. 224; *Falvey v. Northern Transportation Co.*, 15 Wis. 129.

And in *Dorr v. N. J. Steam Nav. Co.*, 1 Kernan, 487, 491, in the Court of Appeals, *Parker, J.*, says: "I am not aware that *Gould v. Hill* has been followed in any reported case."

In *Wells v. Steam Nav. Co.*, 2 Comst. 209, *Bronson, J.*, who seems to have concurred in the decision of *Gould v. Hills*, says: "It is a doubtful question;" and *Parker, J.*, in *Dorr v. N. J. Steam Nav. Co.*, *supra*, says: "That a carrier may, by express contract, restrict his common-law liability, is now, I think, a well-established rule of law. It is so understood in England: *Aleyn*, 93; 1 *Ventris*, 190, 238; *Peake's N. P. C.* 150; 4 *Burrow*, 2301; 1 *Starkie*, 186; 8 *M. & W.* 443; 4 *Co.* 84; and in Pennsylvania, 16 *Penn. St.* 67; 5 *Rawle*, 179; 6 *Watts & S.* 495. In other States where the question has arisen, whether notice would excuse the liability of the carrier, it seems to have been taken for granted that a special acceptance would do so; and in *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 382, it was so held by the Supreme Court of the United States."

The Superior Court of the city of New York has adopted a similar view, in the same case. 4 *Sandf.* 136; and in *Stoddard v. Long Isl. Railw.*, 5 *Sandf.* 180.

The following cases may also be here referred to as holding the general doctrine upon this subject: *Swindler v. Hilliard*, 2 *Rich.* 286; *Camden & Amb. Railw. v. Baldauf*, 16 *Penn. St.* 67; *Reno v. Hogan*, 12 *B. Monr.* 63; *Farm. & Mech. Bank v. The Champlain Transp. Co.*, 23 *Vt.* 186; *Barney v. Prentiss*, 4 *Har. & Johns.* 317.

As the result of all the cases upon the subject, and of true policy and sound principle, it must be admitted that a carrier may relieve himself from his duty to insure the safe arrival of the goods at their destination, by a special contract to that effect, or what is equivalent, that a special notice to that effect, brought home to the mind of the owner of the goods, at the time of delivery, or before, and no objection made to it, will have the force of a special contract, according to the English cases, but that, according to many of the American cases, some further evidence of assent on the part of the owner is requisite. Opinion of *Isham, J.*, in *Kimball v. Rut. & Bur. Railw.*, 26 *Vt.* 247. If a different rate of charge is made, the election of the lower rate is an assent to the notice.

The language of *Nelson, J.*, in *New Jersey Steam Nav. Co. v. The Merchants' Bank*, 6 How. (U. S.) 344, is perhaps a fair exposition of the American law upon the subject: "He (the carrier) is in a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself, without the assent of the parties concerned. And this is not to be implied or inferred

home to the knowledge of the owner of the goods, before or at the time of delivery to the carrier, if assented to by

from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the court, in *Hollister v. Nowlen*, that if any implication is to be indulged, from the delivery of the goods under the general notice, it is as strong, that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation, by parol or in writing, should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful or conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties."

To the same effect is the opinion of the court in *Farmers' & M. Bank v. The Champlain Transp. Co.*, 23 Vt. 186, 205. "We are more inclined to adopt the view, which the American cases have taken of the subject of notices by common carriers, intended to qualify their responsibility, than that of the English courts, which they have, in some instances, subsequently regretted. The consideration that carriers are bound, at all events, to carry such parcels, within the general scope of their business, as are offered to them to carry, will make an essential difference between the effect of notices by them, and by others who have an option in regard to work which they undertake. In the former case, the contractor, having no right to exact unreasonable terms, his giving public notice that he shall do so, where those who contract with him are not altogether at his mercy, does not raise the same presumption of acquiescence in his demands, as arises in those cases where the contractor has the absolute right to impose his own conditions. And unless it be made clearly to appear that persons contracting with common carriers expressly consent to be bound by the terms of such notices, it does not appear to us that such acquiescence ought to be inferred."

And a notice restricting the carrier's liability for baggage, "printed on the back of the passage ticket, and detached from what ordinarily contains all that it is material for the passenger to know, does not raise a legal presumption that the party had knowledge of the notice before the train left. That is a question for the jury." *Brown v. Eastern Railw. Co.*, 11 Cush. 97. In a late case (*State and Burgess v. Townsend*, 37 Alab. 247), it was decided that a common carrier cannot limit his common-law liability by any general notice, but may do so by special contract with the shipper. And a bill of lading, given by the carrier on receipt of the goods, and accepted by the shipper, is a special contract within the meaning of the rule. But such special contract cannot be considered as exempting the carrier from responsibility for any loss occurring from his own negligence. But when the bill of lading exempted the company from all responsibility, except for willful negligence or fraud, on account of the freight being reduced, it was held a valid contract. *Lee v. Marsh*, 43 Barb. 102. Common carrier cannot stipulate for exemption from responsibility for negligence, either of himself or his servants. *Ashmore v. Penn. Steam Towing and Transp. Co.*, 4 Dutcher, 180.

the owner, which is but another form of defining an express contract, which seems to be everywhere recognized as binding upon those contracting with carriers, unless New York may form an exception.⁴

§ 145. But it was held that the owner of goods delivered at the station-house of the railway, to be carried from Dover to Boston, and which were consumed by an accidental fire, at the former place, was not precluded from recovery of the value of the goods by a general notice of the company, known to the plaintiff at the time of the delivery of his goods, that all goods would be at the risk of the owners while in the defendants' warehouse.⁵

§ 146. And in another case it was held, that a paper exonerating the company from all liability to the plaintiff for damage, which might happen to any horses, oxen, or other animals he might send by their railway, did not exonerate them from liability for negligence.⁶

§ 147. In Pennsylvania, the rule of the English law, that a carrier may restrict his liability, by a special acceptance, seems to be firmly established, notwithstanding some misgivings expressed by the courts in regard to the good policy of such a rule. The more prominent cases upon the subject are referred to in the opinion of the court, in *Dorr v. N. J. Steam Nav. Co.*⁷ The onus of proving any qualification of the common-law responsibility of the carrier rests upon him. The notice to be of any force must amount to actual notice. And where the general object of a check or ticket is emblazoned in large letters, and the restriction printed in small ones, it will not be regarded as of much force as evidence of notice. But where the notice is

⁴ *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Sager v. The P. S. & P. Railw. Co.*, 31 Maine, 228; *Bean v. Green*, 3 Fairfield, 422; *Cooper v. Berry*, 21 Ga. 526.

⁵ *Moses v. Boston & Maine Railw.*, 4 Foster, 71; *ante*, ch. x., n. 13.

⁶ *Sager v. P. S. & P. Railw.*, 31 Maine, 228.

⁷ 1 Kernan, 485, 491; *Atwood v. The Reliance Co.*, 9 Watts, 87; *Bingham v. Rogers*, 6 Watts & Serg. 495; *Laing v. Colder*, 8 Penn. St. 479.

shown to have been acquiesced in, the effect is only to render the bailees or private carriers for hire.⁸

§ 148. It would seem then to be the result of the decisions everywhere, that carriers may limit their common-law responsibility as insurers, by special contract at the time of acceptance, and that a notice to that effect, brought home to the knowledge of the owner of the goods at the time, or before the delivery of the goods, and assented to by him, or against which he makes no remonstrance or objection perhaps, will have the same effect in general with such exceptions, limitations, and qualifications as reason and justice may require, to be judged of by the court and jury, with reference to the circumstances of each particular case.⁹

⁸ *Verner v. Sweitzer*, 32 Penn. St. 208. And where the shipper assumes the exclusive charge of goods during the voyage, to excuse the carrier, it must appear that the damage occurred from the fault of the shipper. *Roberts v. Riley*, 15 La. Ann. 103.

⁹ The English statute, 17 & 18 Vict. c. 31, § 7, defines the effect of these notices of carriers in England, which is considered more at length under ch. xx. The latest English case upon this point, *Simons v. Great Western Railw.*, 2 C. B. (N. S.) 620, holds, that a notice, signed by a person who cannot read, and who is told by the clerk of the company that it is mere form, is not binding as a contract. *Cooper v. Berry*, 21 Ga. 526. Whether the consignor of goods, or the person depositing them with the carrier, has authority to contract, on the part of the consignee, being the owner, or party interested in the transportation, for exemption of the carrier from his ordinary responsibility, is, in each particular case, a question of fact, depending upon the special circumstances, and must be determined by the jury according to what is reasonable and just, between the consignee and the carrier. *Am. Transportation Co. v. Moore*, 7 Law Reg. 352.

The questions commonly arising, in trials where the carrier claims exemption from his ordinary responsibility, in consequence of special contract, or notice, are here discussed, by *Campbell, J.*, with a good deal of thoroughness and ability. And the opinion upon another point, the just construction of the act of Congress, exempting the owners of ships from liability for losses by fire, except where the vessel is "used in rivers or inland navigation," is surprisingly elaborate and thorough. The conclusion arrived at, that the navigation of the great American lakes and their connecting waters does not come within the exception, is probably in accordance with the recently established opinions, as to the extent of the admiralty jurisdiction in this country, although not perhaps entirely consonant with the earlier, or the popular opinions upon the subject. In regard to the last point the court were divided.

§ 149. The English statute¹⁰ in regard to carriers claiming exemption from their common-law responsibility, by reason of special notice or contract, requires that it be embodied in a special contract in writing between the company and the owner, or person delivering the goods to the company, that the contract be signed by such owner or person, and that the court or judge shall determine it to be just and reasonable. Under this statute the House of Lords have held, in a somewhat recent case, where the agent of the owner of marble chimney-pieces forwarded them to the company for transportation, and received at the same time notice, that if the company forwarded them as common carriers, it must be done under an insurance and a reasonable premium paid therefor; and where, after considerable discussion between the agent of the owner and the company, as to the rate of premium to be paid for insurance, he finally gave directions in writing to have the goods forwarded "uninsured," which was accordingly done, and the goods were injured on the journey, that the transaction did not come within the requirements of the statute, not being embodied in any written contract properly signed by the owner or his agent; but that if such had been the fact, the "conditions would have been neither just nor reasonable." Lord *Chelmsford*, with his usual common-sense sagacity and natural instinct in favor of practical convenience, seems to have entertained a different view in regard to the reasonableness and justice of the company requiring an additional premium for insuring the safety of marble chimney-pieces, above what would have been demandable in the case of blocks of marble, or other commodities not specially fragile.¹¹

§ 150. In regard to the carrier waiving his notice, it has been held not to amount to that, because he had before

¹⁰ Railway and Canal Traffic Act of 1854, § 7, 17 & 18 Vict. c. 31.

¹¹ *Peek v. North Staffordshire Railw. Co.*, El., Bl., & El. 958; s. c., 6 Jur. (N. S.) 370; s. c., 6 W. R. 997, K. B.; s. c., 8 W. R. 364, Exch. Chamber.

settled for damages to goods, with the same party, without inquiring into the cause of such damages.¹² And a railway company who had given notice that they would not be responsible for the luggage of passengers, unless booked and paid for according to their rate of charging the excess above a certain weight, were held responsible for luggage delivered to one of their servants, and not booked and paid for, in the absence of evidence that the company had provided the means of booking.¹³ And if the owner declare the nature of the goods, he is not bound to tender the additional charge required by the statutes or rules of the company, until demanded.¹⁴ If a carrier give two notices, he is bound by the one least for his advantage.¹⁵

§ 151. A ticket delivered at the time of receiving live stock for transportation on a railway, that the carrier will not be responsible for any injury, while travelling, loading, or unloading, will not excuse him from responsibility in not providing a sufficient carriage.¹⁶

¹² *Evans v. Soule*, 2 M. & S. 1.

¹³ *Great Western Railw. v. Goodman*, 12 C. B. 313.

¹⁴ *Great Northern Railw. v. Behrans*, 7 H. & N. 950. See also *Wilson v. Freeman*, 3 Camp. 527.

¹⁵ *Mann v. Baker*, 2 Starkie, 255.

¹⁶ *Shaw v. York & North Midland Railw.*, 13 Q. B. 347.

CHAPTER XIII.

NOTICE, OR EXPRESS CONTRACT, LIMITING CARRIERS' LIABILITY.

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| <p>§ 152. <i>Written notice will not affect one who cannot read.</i></p> <p>§ 153. <i>Carrier must see to it that his notice is made effectual.</i></p> <p>§ 154. <i>Must be shown that knowledge of notice came to consignor.</i></p> <p>§ 155. <i>But former dealings with same party may be presumptive evidence.</i></p> <p>§ 156. <i>Carrier cannot stipulate for exemption from liability for negligence.</i></p> | <p>§ 157. <i>But carrier may be allowed to stipulate for exemption from responsibility as an insurer.</i></p> <p>§§ 158-163. <i>Review of the cases favoring this proposition.</i></p> <p>§§ 164, 165, and n. 22. <i>Review of English cases bearing in opposite direction.</i></p> <p>§ 166. <i>The United States Supreme Court hold to the rule we contend for.</i></p> <p>§ 167. <i>The responsibility of ship-owners under the act of Congress.</i></p> |
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§ 152. THE courts have from time to time been accustomed to engraft such exceptions, in regard to the effect of carriers' notices, as seemed necessary to render their operation reasonable and just. It was held that such notice could have no effect, by being posted upon the office of the carrier, if the owner of the goods or the party who delivers them at the office cannot read.¹

§ 153. In another case, where the party delivering the goods could read, and had seen the carrier's notice upon a board hanging in the office, but, *not supposing* it interested him, had, in fact, never read it, it was held he was not affected by it. Lord *Ellenborough* said at the trial, "You cannot make this notice to this *non-supposing* person." "The hardship of the case cannot alter the liability of the par-

¹ *Davis v. Willan*, 2 Starkie's Cases, 279. *Abbott, J.*, here says, a notice, to have effect, must be brought "plainly and clearly to the mind of the party who deals with them." "It may happen that the party cannot read, and if it so happen, it is the misfortune of the carrier, or his fault, that he does not communicate his intention by some other means."

ty." The rule is here laid down by this learned and sensible judge, that the carrier must see to it that he adopts such a medium of notice that the party with whom he deals shall be "effectually apprised of the terms upon which he proposes to deal."²

§ 154. And it was held the notice was insufficient if the advantages of the mode of carriage were stated in large letters and the conditions and exemptions in small letters.³ So, too, if the printed notice be in a place where the party would not ordinarily see it, in the mode in which he came to the office, it could have no effect upon the liability of the carrier.⁴ So, too, where the goods were delivered at a station where no notice was put up, although notices were put up at each terminus of the route.⁵ All this shows very clearly that such notices, by printed cards or inserted in newspapers, are not sufficient, unless it be shown that knowledge of the contents of such notices came to the party, and this is always a question for the jury.⁶ And

² *Kerr v. Willan*, 2 Starkie, 53. When the case came before the full bench, on motion for new trial, the court said, in regard to the duty to make the notice effectual, "If the agent could not read, he might be able to hear, or, at all events, a handbill might be delivered to him, to be taken to his principal." The rule of law might be superseded by special contract, but it must be proved, and whether it exists or not is always a question for the jury.

³ *Butler v. Heane*, 2 Campb. 415.

⁴ *Walker v. Jackson*, 10 M. & W. 161; *Gouger v. Jolly*, 1 Holt, N. P. C. 317.

⁵ 1 Holt, N. P. C. 317. *Gibbs*, Ch. J., says, "the carrier is liable, unless express notice is brought home to the plaintiff." This is the ground assumed in all the cases. *Beekman v. Shouse*, 5 Rawle, 179; *Bean v. Green*, 3 Fairfield, 422; *Story on Bailments*, § 558; *Brooke v. Pickwick*, 4 Bing. 218. *Best*, Ch. J., here lays down the rule, in regard to notices, that it is not enough to post them up in a conspicuous place in the office of the carrier. But they must be at the pains to make the customer understand the restrictions which they propose to claim upon their responsibility. This we think the only safe rule, in regard to notices by carriers. And unless this be clearly shown, the leaving the goods, without objection, seems to be no ground whatever of presuming against the owner. And even with this, it is still a question for the jury, whether he expected to be bound by it, or, in other words, whether he supposed, at the time, that the carrier so understood the matter. *Ante*, ch. xii., xiii.

⁶ *Clayton v. Hunt*, 3 Campb. 27; *Rowley v. Horne*, 3 Bing. 2. In this case

there should be positive evidence of assent to the condition contained in the notice, it is said, in some cases, and this question of assent is to be determined by the jury upon the evidence *aliunde*, and not upon the terms of the receipt merely.⁷ But where the carrier regularly issued his hand-bills every month, which contained a notice that he would only receive goods, upon the condition that he was not to be liable for inward condition, leakage, and breakage, and that he should not be responsible for any loss or damage to the goods during the voyage; and it was conceded that the plaintiff had received such circular regularly; it was held he could not recover of the carrier for the loss of a cask of brandy which he had given the carrier for transportation and which had got staved during the voyage. The court regarded the circular as forming the basis of the contract between the parties.⁸

§ 155. But the carrier may give evidence of the manner of transacting similar previous business between him and the plaintiff as presumptive evidence of notice, and an implied special acceptance in this particular case.⁹

the defendant proved that the plaintiff had regularly taken a weekly newspaper, in which his advertisements were constantly inserted, for over three years. The jury having found a verdict for plaintiff for the full loss sustained, the full bench refused a new trial. They said it could not be intended a party read all the contents of any newspaper he might take. The carrier should fix upon the party a knowledge of the notice, and this he might easily do, by delivering to each one who brought a parcel a printed copy of such notice.

⁷ *Michigan Central Railw. v. Hale*, 6 Mich. 243.

⁸ *Phillips v. Edwards*, 3 H. & N. 813.

⁹ *Roskell v. Waterhouse*, 2 Starkie, 461. In this case the evidence was that the plaintiff had sent similar parcels by defendant, which had been lost, and no action brought for the loss. *Mayhew v. Eames*, 3 B. & C. 601. In this case the principals had previous parcels sent by the same carriers, and had received at such times their printed notices, and the court held that sufficient notice to them, in this case, notwithstanding their agent, in this particular case, delivered the parcel to the carriers, without any knowledge that they had given notice that they would not be responsible for bank-notes, unless entered and paid for accordingly. The court say the principals should have apprised their agents of this notice, and not to send by them without insuring.

Notice to the principals in another transaction is good in this, but not so of notice to the agents. Notice to the agents, in order to bind the principals, must

§ 156. But notwithstanding such notice, that parcels are to be at the risk of the owner, and this assented to by the owner, the cases chiefly agree that the carrier is still liable for gross neglect,¹⁰ and many of the earlier and best considered English cases regard such notices as having no reference whatever to the ordinary risks of transportation, but as only intended to relieve the carrier from those extraordinary responsibilities which the common law had imposed upon this class of bailees. And it cannot be denied that this view of the subject has very much to commend it to our favorable consideration. There is certainly something very incongruous, and not a little revolting to the moral sense, that a bailee for hire should be allowed to stipulate for exemption from the consequences of his own negligence, ordinary or extraordinary. A laborer, domestic, or mechanic, who should propose such a stipulation, would be regarded as altogether unworthy of confidence in any respect, and the employer, who should submit to such a condition, must be reduced to extreme necessity, one would suppose. We could scarcely believe that any competent tribunal would for a moment entertain such a proposition, if we did not know that the ablest courts in Westminster Hall had done so. This question is considerably discussed in some of the late cases in the English courts under the Railway and Canal Traffic Act.¹¹ In the

be in the same transaction. The principal and agent, so far as the same transaction is concerned, are to be regarded for purposes of notice, as identical. *Fitzsimmons v. Joslin*, 21 Vt. 140, 141, 142, opinion of the court.

¹⁰ *Post*, §§ 158-167, and cases cited. See also *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 205, opinion of the court upon this point, and cases cited. *Powell v. Penn. Railw. Co.*, 32 Penn. St. 414; *Illinois Central Railw. v. Morrison*, 19 Illinois, 136. Where the plaintiff contracted to have cattle carried on defendants' train at a lower rate than the usual charge, and stipulated to assume the risk of transportation, and accompanied and had them in charge during the transportation, it was held that there had been no complete delivery to the company, and that they were only liable for gross or willful misconduct. *Ib.* And the same rule was adopted in *Goldey v. Pennsylvania Railway*, 3 Penn. St. 242.

¹¹ 17 & 18 Vic., ch. 31, § 7.

Court of Exchequer¹² it was decided, on solemn argument, that a notice of the company, assented to by the consignee, and which by consequence became a contract, that in regard to live stock they would not be liable for any injury or damage howsoever caused, was a reasonable contract, and excused the company for a loss occurring from a defect in the box in which a horse was carried, this defect not being known to the servant who put it to the use where the damage occurred. But in the same case in the Exchequer Chamber,¹³ upon great consideration, it was held that such a contract was unreasonable, within the statute requiring the court to determine the question of the reasonableness of contracts by carriers for exemption from responsibility; and that it was therefore void under the statute, and that it did not protect the company from liability in respect of the defect in the truck.

§ 157. But that a carrier by steamboat or railway, or indeed, in any other mode, should be allowed to stipulate for exemption from insurance of the goods, or else demand a premium and specification, as in other cases of insurance, seems highly just and reasonable.¹⁰

§ 158. In *Duff v. Budd*,¹⁴ the carrier was held liable for delivering a box to a wrong person, notwithstanding a notice that he would not be liable for parcels of that description, the judge directing the jury that the carriers' negligence had been such as to render it unnecessary to consider the question of the notice, and the full bench, on argument, refused a new trial.

§ 159. And in *Garnett v. Willan*,¹⁵ where the carrier

¹² *McManus v. Lancashire Railw.*, 2 H. & N. 693.

¹³ 4 H. & N. 327. It is here said the statute is to be construed with reference to the state of the law relating to carriers at the time it was passed.

¹⁴ 3 Brod. & Bing. 177.

¹⁵ 5 Barn. & Ald. 53. And in such case the jury having found that the risk was increased by the change of carriers, the first carrier is liable, even where he was *deceived* as to the value of the parcel. *Sleat v. Fagg*, 5 B. & Ald. 342; *post*, note, § 161, n. 19.

delivered the parcel to another line of carriers, and it was lost before it reached its destination, it was held, notwithstanding a similar notice, the first carrier was liable. In both these cases the carrier was held liable as for gross negligence. And *Beck v. Evans*¹⁶ was decided upon the same ground, and involves the very same point.

§ 160. In *Bodenham v. Bennett*,¹⁷ it was held that such notices are only intended to exempt carriers from extraordinary events, and in the language of Baron *Wood*, "were not meant to exempt from due and ordinary care."

§ 161. In *Batson v. Donovan*,¹⁸ *Best, J.*, said, "The only effect of the notice is that employers are informed that carriers will not be insurers of goods above a certain value, unless paid a reasonable premium of insurance." And the learned judge insists with great earnestness that the carrier and his servants must, in cases of this kind, notwithstanding the notice, assented to by the owner of the goods, "take the same care of them that a prudent man would take of his own property," which seems just and reasonable. But the majority of the court held in this case (*Best, J., dissentiente*), that the plaintiff, by delivering a box containing bills, checks, and notes, to the value of £4,072, without intimating that the contents were valuable, when he knew that the carrier expected a premium for insurance in such cases, was guilty of such fraud and deception as to preclude a recovery, except for such gross neglect as would be reprehensible if the parcel had been of less value than £5, the limit named in the carrier's notice. And we see no reason to question the soundness of the grounds

¹⁶ 16 East, 244. *Smith v. Horne*, 8 Taunt. 144, is to the same effect. So also is *Reno v. Hogan*, 12 B. Monroe, 63.

¹⁷ 4 Price, 31. *Birkett v. Willan*, 2 B. & Ald. 356, is decided upon the authority of *Bodenham v. Bennett*, and holds that such notice, assented to by the owner of the goods, will not excuse the carrier for gross negligence.

¹⁸ 4 Barn. & Ald. 21.

upon which the case is put,¹⁹ and it seems to us entirely consistent with the general views assumed by *Best*, J.

§ 162. The general rule of law upon this point is well stated by Baron *Parke*.²⁰ "The weight of authority seems to be in favor of the doctrine, that in order to render the carrier liable, after such a notice, it is not necessary to prove a total abandonment of that character, or an act of willful misconduct, but that it is enough to prove an act of ordinary negligence, gross negligence in the sense in which it has been understood in the last-mentioned cases [*Batson v. Donovan*, and *Duff v. Budd*]. And the effect of such notice is, that the carrier will not be responsible, at all events, unless he is paid a premium,—but still he undertakes to carry, and is therefore bound to use ordinary care in the custody of the goods, and their conveyance to

¹⁹ See *post*, ch. xx., and cases cited.

Some of the early cases do not seem to regard a deception in reference to the contents of a parcel delivered to a carrier, as excusing the carrier from his common-law liability of insurer, there being no notice from the carrier in regard to being informed of the contents of valuable parcels. *Kenrig v. Eggleston*, Aleyn, 93. So in the case from 1 Ventris, 238, cited by Lord *Mansfield*, in *Gibbon v. Paynton*, 4 Burrow, 2298. But his lordship, who saw through all disguises, dissents emphatically from any such rule of responsibility, and endorses the case of *Tyly v. Morrice*, Carthew, 485, as "being determined on the *true* principle that the carrier was liable *only* for what he was *fairly told of*."

In this last case two bags were delivered to the carrier sealed up, said to contain £200, and receipted accordingly, with a promise to deliver to T. Davis, he to pay 10s. per cent. for carriage and *risk*. The carrier was robbed, and the chief justice was of opinion the plaintiff should only recover for £200, the undertaking being for £200, and the reward only for that sum. And "since the plaintiff had taken this course to *defraud the carrier of his reward*, he had thereby barred himself of that remedy which is *founded only on the reward*." And we do not see why this old rule, from Carthew, adopted by Lord *Mansfield*, in his opinion in this case (*Gibbon v. Paynton*), does not contain the essence of the law upon this point at the present time.

The case of *Gibbon v. Paynton* was that of £100 in gold, put in an old nail-bag, and that filled with hay to give it a mean appearance, and no intimation given to the carrier of its value; the bag and hay arrived safe, but the money was gone. The jury found a verdict for defendant, and the court unanimously denied a new trial.

²⁰ *Wyld v. Pickford*, 8 M. & W. 443; *Hall v. Cheney*, 36 N. H. 26.

and delivery at their place of destination, and in providing proper vehicles for their carriage. And after such notice it may be that the burden of proof of damage or loss by want of such care would lie upon the plaintiff."

§ 163. This seems to be placing the effect of such notices upon a reasonable basis, and most of the American cases will be found to have adopted, in the main, similar views. The United States Supreme Court, in a case²¹ of great

²¹ *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 344. This was a case as before stated where an express carrier, by special contract with the company, was allowed to carry a certain crate upon their boats, under the care and oversight of the expressman, with the express stipulation that all persons delivering parcels, to be carried by express, should be furnished with the following notice, annexed to the receipt or bill of lading executed for the goods; and that it should also be annexed to his advertisements, published in the public prints, or elsewhere: "Take notice, William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care, nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be and is transported, in respect to it, or its contents, at any time."

Mr. Harnden collected \$20,000 in specie, in the city of New York, for the Merchants' Bank, Boston, and was transporting it to the bank, on board the *Lexington*, one of the company's boats, at the time it was burned in the Sound, through the gross mismanagement of the company's agents, and the specie lost.

Mr. Justice *Nelson*, in giving the opinion of the court, said: "The special agreement in this case under which the goods were shipped, provided, that they should be conveyed at the risk of Harnden, and that the respondents were not to be responsible to him, or to his employers, in any event, for loss or damage. The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for willful misconduct, gross negligence, or want of ordinary care, either in the sea-worthiness of the vessel, her proper equipment and furniture, or in her management by the master and hands. This is the utmost effect that was given to a general notice, both in England and in this country, when allowed to restrict the carrier's liability, although as broad and absolute in its terms as the special agreement before us (*Story on Bailments*, § 570); nor was it allowed to exempt him from accountability for losses occasioned by a defect in the vehicle or mode of conveyance used in the transportation. Although he was allowed to exempt himself from losses arising out of events and accidents against which he was a sort of insurer, yet, inasmuch as he had undertaken to carry the goods from one place to another, he was deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and was therefore bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation.

importance, assume this ground, in terms. The opinion of Mr. Justice *Nelson* is worthy of consideration upon this point.

This rule, we think, should govern the construction of the agreement in question."

The same view is adopted in the following cases: *Clark v. Faxton*, 21 Wend. 153; *Dorr v. N. J. Steam Nav. Co.*, 4 Sand. 136; *Parsons v. Monteath*, 13 Barb. 353; *Stoddard v. The Long Island Railw.*, 5 Sandf. 180; *Fish v. Chapman*, 2 Kelly, 349. Most of the American cases have maintained the principle, that a carrier cannot, by special notices, brought to the knowledge of the owner of the goods, or by contract even, exempt himself from the duty to exercise ordinary care and prudence in the transportation of freight and baggage. *Sager v. Portsmouth, S. P., & E. Railw.*, 31 Maine, 228; *Camden & Amboy Railw. v. Bauldauff*, 16 Penn. St. 67; *Laing v. Colder*, 8 Penn. St. 479; *Bingham v. Rogers*, 6 Watts & Serg. 495, 500.

The case of *Camden & Amboy Railw. v. Bauldauff*, was that of a German, who could not read English. The railway advertised that they would carry fifty pounds baggage for each passenger, and that passengers are "expressly prohibited from taking anything, as baggage, but their wearing apparel, which will be at the risk of the owner." The plaintiff had, in a trunk with his ordinary baggage, two thousand one hundred and one five-franc pieces. He paid for extra weight, and gave it in charge of the proper servant of the railway. The trunk was lost.

The court held the company liable on two grounds: 1. They have failed to show the manner of the loss, and the law presumes negligence, from the loss. 2. They have failed to show that the contents of their notice came to the knowledge of the plaintiff, which leaves them liable, as insurers, at common law.

In giving judgment, the court, *Rogers, J.*, say: "They undertake to carry for hire, and by the very nature of their employment, to bestow, for the preservation of the goods, at least the ordinary care of a bailee for hire. From this duty, I have no hesitation in saying, they cannot discharge themselves, even by a special agreement with the owner. Such a stipulation would be void, being against the policy of the law. There is no principle in the law better settled than that, whatever has an obvious tendency to encourage guilty negligence, fraud, or crime, is contrary to public policy. Such, in the very nature of things, would be the consequence of allowing the common carrier to throw off the obligation which the law imposes upon him, of taking at least ordinary care of the baggage, or other goods, of a passenger. Under such a regulation, no man's property would be safe. *Cole v. Goodwin*, 19 Wend. 251; *Atwood v. The Reliance Co.*, 9 Watts, 87."

And in *The Penn. Railw. v. McCloskey*, 23 Penn. St. 526, 532, the court say, in giving judgment: "Assuming that a public company of carriers may contract for other exemption from liability, than those allowed by law, still such a contract will not exempt from liability for gross negligence." And in *Baker v. Brinson*, 9 Rich. 201, it is decided, that where a carrier limits his liability, by special contract, the *onus* is upon him to show that the loss is within the exception, and that

§ 164. But some of the later English cases, before the late statute, the Railway and Canal Traffic Act of 1854,²² he was guilty of no negligence. See also, to same effect, *Graham & Co. v. Davis*, 4 Ohio (N. S.) 362. So also *Baldwin v. Collins*, 9 Rob. (Louis.) 478; *Newstadt v. Adams*, 5 Duer, 43.

²² *Post*, chs. xiii., xxi., and notes.

In *Austin v. The Manchester, S. & L. Railw.*, 10 C. B. 454; s. c., 11 Eng. L. & Eq. 506, the defendants let their trucks to the plaintiff, for the conveyance of certain horses by the defendants' engines along their railway, and delivered to the plaintiff a ticket, or notice, to the effect, "that the charge was for the use of the carriages and the locomotive power only, and that the plaintiffs were to see to the sufficiency of the carriages, before they allowed their horses or live stock to be placed therein, that the defendants would not be responsible for any alleged defects in their carriages, unless complaint was made at the time of booking, or before the same left the station, nor for any damages, however caused, to horses," etc. It was held that the plaintiff could not recover for damage done to his horses, in the transportation, through the breaking of an axle-tree, which was attributable to the culpable negligence of the company's servants.

Cresswell, J., in delivering judgment, said: "In the largest sense those words might exonerate the company for damage done willfully, a sense in which it was not contended they were used in the contract; but giving them the most limited meaning, they must apply to all risks of whatever kind, and however arising, to be encountered in the course of the journey, one of which is undoubtedly the risk of a wheel taking fire, owing to neglect to grease it. Whether that is called negligence merely, or gross negligence, or culpable negligence, or whatever other epithet may be applied to it, we think it is within the exemption from responsibility provided by the contract."

It was held too, in *Chippendale v. The Lanc. & Yorkshire Railw.*, 7 Eng. L. & Eq. 395; s. c., 15 Jur. 1106, that in a case where the owner of cattle transported on defendants' railway, saw them put in the carriages, and signed a ticket, with this condition annexed, "The owner undertaking all risks of conveyance whatever," that there was no implied stipulation that the carriage should be fit for the conveyance of the cattle. And in *Carr v. Same defendants*, 7 Exch. 707; s. c., 14 Eng. L. & Eq. 340, upon a similar contract, where plaintiff's horse was injured, by the horse-box being propelled against some trucks, through the gross negligence of the company, it was held (*Platt, B., hesitante*), that the company were not responsible.

The grounds of the decision are stated very fully in the opinion of *Parke, B.*: "The jury have found that the defendants have been guilty of gross negligence and that must be taken as a fact. In my opinion the owner of the horse has taken upon himself the risk of conveyance, the railway company being bound merely to find carriages and propelling power; the terms of the contract appear to me to show this. The company say they will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description, travelling upon their railway. This, then, is a contract by virtue of which the plaintiff is to stand the risk of accident or injury, and certainly, when we look at the nature of the things conveyed, there is nothing unreasonable in the arrangement.

had departed essentially from the basis, upon which the earlier cases, in regard to notices, in that country, rested.

In the case of *Austin v. The Manchester, Sheffield, & Lincolnshire Railw. Company*, 17 Q. B. 600; s. c., 5 Eng. L. & Eq. 329, the language of the contract was different from the present, but not to any great extent. [His lordship stated the case.] In that case, the accident was occasioned by the wheels not being properly greased; in the present case, the carriage that contained the plaintiffs' horse was driven against another carriage. We ought not to fritter away the meaning of contracts merely for the purpose of making men careful. That is a matter that we are not bound to correct. The legislature may, if they please, put a stop to contracts of this kind, but we have nothing to do with them except to interpret them when they are made." But the opinion of Baron *Platt* seems to us far more consonant with reason and justice, and with the principle of the decided cases, both English and American. The learned Baron says, "The declaration states that the defendants were guilty of gross negligence, and that fact was proved. The *gravamen* of the charge is the gross negligence. [His Lordship read the notice.] Now, undoubtedly, since the establishment of railways, new subjects of conveyance have arisen. Formerly, horses were seldom carried, but now they are ordinarily conveyed by the trains. It is therefore said that new stipulations are necessary to guard carriers from the risks which are incidental to this new mode of conveyance. It is suggested that the animal may be alarmed by the noise of the engine, by the speed of the carriages, and by various other causes, and that, unless we take upon ourselves the office of legislation, this ticket absolves the carriers from all responsibility. I own I am startled at such a proposition, and considering the high authority by which it is supported, I feel I ought to doubt and to distrust my own opinion. But I am bound to say, that I am not satisfied that the language of this ticket absolves the railway company from all liability for damage. I cannot help thinking that the owner of the goods never dreamed of such a thing when he signed this contract. In truth, this accident had nothing to do with the conveyance of the horse. The accidents referred to are those which occurred whilst the article is in a state of locomotion. The case of gross negligence, as it seems to me, is not pointed at by this contract." And in *McManus v. Lancashire & Yorkshire Railw.*, 2 H. & N. 593; s. c., 30 Law Times, 321, the same rule is maintained as in *Chippendale v. Lond. & Yorkshire Railw.*, so late as January, 1858.

In the late case of *Wise v. The Great Western Railw.*, 36 Eng. L. & Eq. 574, s. c., 1 H. & N. 63, where a horse was delivered to defendants to be carried to W., and the person delivering it signed a writing, agreeing to abide by a notice contained in it, that the directors would not be answerable for damage done to any horses conveyed by the railway, and the horse reached the station at W. safely, but the company's servants either did not notice it, or forgot that the horse had arrived, and upon the plaintiffs' calling for it the next day it was discovered in a horse-box on the siding, and found to have sustained serious injury from cold, and remaining in a confined position all night; held, that the company were protected under the statute by the signed contract. And it would seem that in such case the company would not be liable independent of the contract, the first fault being plaintiff's not being there to receive the horse upon its arrival at the station. See *ante*, ch. x.

It does not seem to be regarded as important that the owner of the goods

§ 165. We have arranged these cases in a note²² at the end of this section, as a remarkable illustration of the ten-

should sign any writing, or indeed that he should even receive a printed ticket, on notice of terms of carriage; but if he is in any way made aware of the terms upon which the carrier expects to receive his goods, and consents to deliver them without the carrier, or some one authorized to act upon his behalf, distinctly receding from the terms of the notice, he is bound by it. *The York, Newcastle, & Berw. Railw. v. Crisp*, 14 C. B. 527; s. c., 25 Eng. L. & Eq. 396. In the case of *Walker v. The York & North M. Railw. Co.*, 2 El. & Bl. 750; s. c., 22 Eng. L. & Eq. 315, the owner of the goods distinctly informed the station-agent that the company's notice was not binding upon him. Yet inasmuch as the notice itself stated that neither the station-clerk nor other servants of the company had any authority to alter or vary the terms of the notice, the court held the plaintiff bound by these terms, one of which was, that the company were not to be responsible for the delivery of fish in any certain or reasonable time, nor in time for any market, nor for any loss or damage arising from any delay or stoppage, etc.

The learned judge, at the trial, told the jury that if the plaintiff had been served with the notice, and afterwards forwarded the fish, they ought to infer an agreement on his part to be bound by the terms of the notice, unless there appeared an unambiguous refusal on his part to be bound by the notice, and an acquiescence by the company in that refusal. It was held by the full bench, that the direction was right. See also *Morville v. Great Northern Railw.*, 10 Eng. L. & Eq. 366; *Willoughby v. Horridge*, 12 C. B. 742; s. c., 16 Eng. L. & Eq. 437; 12 C. B. 742; *Crouch v. London & Northwestern Railw.*, 7 Exch. 705.

And the case of *Fowles v. The Great Western Railw. Co.*, 7 Exch. 699; 16 Eng. L. & Eq. 531, although determined upon a question of variance, clearly assumes the ground that a carrier's notice will exonerate him from his general obligation. *York, Newcastle, & Berw. Railw. v. Crisp*, 14 C. B. 527; s. c., 25 Eng. L. & Eq. 396.

But the late case of *Hearn v. The London & S. W. Railw.*, 10 Exch. 793; s. c., 29 Eng. L. & Eq. 494 (1855), seems to manifest, in some respects, a disposition in the English courts to hold common carriers to something like reasonable accountability, which some of the former cases had apparently regarded as nearly hopeless, under their most extraordinary notices. But we shall refer to this case more at length under ch. xx., where the present state of the English law is stated.

Many of the later cases in this country seem still disposed to hold the carrier to his common-law responsibility, unless he show a special contract to exonerate him from it, or a notice brought home to the owner of the goods, and assented to by him. *Ante*, ch. xii., n. 3; xiii., n. 21; and even in that case he is still responsible for ordinary care.

And if a loss occur in a case where the carrier is exempted, by special contract, from certain risks, the burden of proof is upon the carrier to show that the loss occurred in consequence of such excepted risks. *Davidson v. Graham*, 2 Ohio St. 131. See also *Slocum v. Fairchild*, 7 Hill, 292; *Whiteside v. Russell*, 8 Watts & S. 44; *Baker v. Brinson*, 9 Rich. 201. See also *Berry v. Cooper*, 28 Ga. 543.

But it was held, that where gold dust was received on board a steamboat, with

dency of judicial administration to bewilder and to delude the wisest and the most profound, when they suffer themselves to be seduced into the belief that it is safe to follow any theory or abstraction, however specious, a moment longer than its results commend themselves to our sense of justice, certainly after they begin most unequivocally to excite sentiments of a more painful character, as many of the English decisions upon the subject of carriers' exemption from liability, even for gross neglect and willful misconduct, could scarcely fail to do, when it was borne in mind that the entire business population of the realm almost was at the mercy of these same carriers. It is surely not to be regarded as matter of surprise, that the legislature felt compelled to interfere, to restore something of the reasonable responsibility of common carriers.²³ The carrier is bound to carry safely, and if he fail to do so the burden is upon him to show a valid excuse. But if the contract of affreightment provide that such carrier shall not be liable for unavoidable damages of navigation, this has been construed to mean unavoidable by them, with the exercise of all the precaution, care, and skill which the law demands of common carriers.²³ If the accident fell upon them without any previous fault of theirs, but in consequence of the vessel and crew proving deficient, after they had done all in their power, it is here said the defendants should be as free from liability as from fault. But common carriers should see to it that they have a sufficient boat and crew, and the fact it proves otherwise would seem to charge them with fault. But a loss by collision is covered by the exception in the bill of lading, "unavoidable dangers of the

express notice from the clerk of the boat that he would receive it only upon express condition that no charge was to be made and no responsibility incurred, and the dust was stolen from the boat without any negligence on the part of the officers of the boat, the owners were not liable. *Fay v. Steamer New World*, 1 Cal. 348.

²³ *Hayes v. Kennedy*, 3 Grant, 351; s. c., 41 Penn. St. 378. The meaning of the terms "act of God," "inevitable accident," etc., are here discussed.

river navigation," if the carrier was without fault, although the collision was caused by the negligence of those navigating the other vessel. Under the late English Railway and Canal Traffic Act, if the carrier refuse to receive the goods, unless the owner assent to certain conditions which the judge trying the case considers reasonable, and the goods are left on these conditions, the carrier is not liable as a common carrier, but only upon the special undertaking.²⁴

§ 166. In a recent case²⁵ before the United States Supreme Court, it was held that carriers may, by express contract with the owner, limit or qualify their common-law responsibility, provided such contract do not attempt to cover losses by negligence or misconduct. Thus where the bill of lading exempted the carriers from responsibility for loss by fire, and the goods were destroyed by fire without the fault of the carriers, they were held excused.²⁶

§ 167. The Act of Congress of 3d March, 1851, exempts the owners of vessels from responsibility for losses by fire caused by the negligence of their officers or agents, in which the owners had no direct participation. The proviso to this act allowing parties to contract in regard to the responsibility of such owners, refers to express contracts.²⁶ A local custom that ship-owners shall be responsible in such cases for the negligence of their officers and agents is not a good custom, being directly opposed to the statute.²⁶

²⁴ *White v. Great Western Railw.* 40 Eng. L. & Eq. 255; s. c., 2 C. B. (N. S.) 7.

²⁵ *York Co. v. Central Railw.*, 3 Wallace, 107.

²⁶ *Walker v. Transportation Co.*, 3 Wallace, 150.

CHAPTER XIV.

NOTICES AS TO ORDINARY AND EXTRAORDINARY RESPONSIBILITY OF CARRIERS.

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| <p>§ 168. <i>American writers and cases adopt this distinction.</i></p> <p>§ 169. <i>The English cases do not seem to recognize it.</i></p> <p>§ 170. <i>The question often raised under English statute.</i></p> <p>171. <i>Held reasonable to claim exemption from risk in transporting fresh fish.</i></p> <p>§ 172. <i>So in carrying dogs and horses may require value to be stated.</i></p> <p>§ 173. <i>How limitation must be claimed and secured.</i></p> | <p>§ 174. <i>Unreasonable conditions stated.</i></p> <p>§ 175. <i>Cannot claim exemption from all responsibility, etc.</i></p> <p>§ 176. <i>Same point further illustrated.</i></p> <p>§ 177. <i>Case of injuring cattle by carrying beyond the station.</i></p> <p>§ 178. <i>Exception of one risk cannot cover another.</i></p> <p>§ 179. <i>Carrier always responsible for negligence.</i></p> |
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§ 168. MANY of the American writers, and some of the American courts, point to a distinction between notices of carriers, which propose to exonerate the carrier from all liability, even for gross neglect and possibly for positive misfeasance and wrong, and such as have reference only to exemption from that extraordinary responsibility imposed by the common law, by which they become insurers.¹ This distinction is pointed out by Prof. Greenleaf,²

¹ *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 186-206, adopts the following language upon this subject: "But we regard it as well settled, that the carrier may, by general notice, brought home to the owner of the things delivered for carriage, limit his responsibility for carrying certain commodities beyond the line of his general business, or he may make his responsibility dependent upon certain conditions, as having notice of the kind and quantity of the things deposited for carriage, and a certain reasonable rate of premium for the insurance paid, beyond the mere expense of carriage."

² 2 Greenl. Ev. § 215, where the author seems to put forth substantially the same view. "It is now well settled that a common carrier may *qualify his liability*, by a general notice to all who may employ him, of any reasonable requisi-

and adopted by Mr. Angell in his treatise on Carriers.³ And Prof. Parsons, in his treatise upon Contracts, has an elaborate and learned note upon the subject, in which he adopts fully the distinction, and arrives at the same conclusion here suggested.⁴

§ 169. But the English cases do not seem to have brought out this distinction so clearly as the American writers upon this subject. It seems to be supposed, by many of the English judges, and some of the late English cases seem to go that length, under their late statutes (which we have referred to, ch. xiii., xx.), that there is no positive objection to recognize the right of a common carrier to stipulate for exemption from all liability, even for gross neglect, or positive misfeasance.⁵

§ 170. Under the more recent English statute,⁶ relation to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like ; as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly. But the right of a common carrier, by a general notice to *limit, restrict, or avoid the liability* devolved upon him by the common law on the most salutary grounds of public policy, has been denied in several of the American courts, after the most elaborate consideration."

³ Angell on Carriers, § 245.

⁴ 1 Parsons on Contracts, 711, n. (h.)

⁵ *Maving v. Todd*, 1 Starkie, 72. This was a case where the goods, while upon the premises and in the care of the carrier, had been destroyed by an accidental fire. It appearing that the carrier had so limited his responsibility that it did not extend to loss by fire, *Holroyd* submitted whether defendants could exclude their responsibility altogether. This was going further than had been done in the case of carriers who had only limited their responsibility to a certain amount. Lord *Ellenborough*, Ch. J. : " Since they can limit it to a particular sum, I think they may exclude it altogether, and that they may say we will have nothing to do with fire." *Leeson v. Holt*, 1 Starkie, 186, is similar. This was where the carrier had given notice that the species of goods for which the suit was brought would be " entirely at the risk of the owners, as to damage, breakage, etc. Lord *Ellenborough*, Ch. J., said, in summing up to the jury, " In the present case they (the carriers) seem to have excluded all responsibility whatsoever, so that under the terms of the present notice, if a servant of the carrier had, in the most willful and wanton manner, destroyed the furniture intrusted to him, the principal would not have been liable." See *Phillips v. Edwards*, 3 H. & N. 813.

⁶ 17 & 18 Vict. c. 31, § 7.

quiring carriers to annex only reasonable conditions to notices or special contracts connected with their transportation, the question has very often arisen of late, and the distinction between ordinary and extraordinary hazards has been often alluded to in discussing questions under that statute.

§ 171. Thus a contract to transport fresh fish was held to involve such extraordinary risks that the carrier might reasonably annex a condition relieving him from all responsibility in consequence of any delay in the arrival of the trains and consequent loss of market, unless it arose from his own gross negligence.⁷

§ 172. And it has often been held that carriers might reasonably limit the extent of their responsibility for the loss or injury of dogs and horses on their trains, to a certain average and moderate value, unless the value was declared and a premium for insurance above that value paid.⁸ The reasonableness of such a condition is based somewhat upon the fanciful value often attached to these animals.

§ 173. But under the English statute⁶ the carrier can only restrict his common-law responsibility by a reasonable limitation, which is embraced in a written contract signed by the party interested, or his agent, and such contract must either in itself, or by reference, set out or embody the condition. A general notice only consented to by the party would be valid for limiting the common-law liability of the carrier; but it must under the statute be embodied in a formal contract in writing, signed by the owner or person delivering the goods, and must be decided to be reasonable by the court.⁹

⁷ *Beal v. Devon Railw. Co.*, 8 W. R. 651. It is here said, that in the case of a carrier, gross negligence includes the want of that reasonable care, skill, and expedition which may properly be expected from him. s. c., 3 H. & C. 337, in Exchequer Chamber.

⁸ *Harrison v. London, Brighton, & So. Coast Railw. Co.*, 2 B. & S. 122; s. c., 6 Jur. (N. S.) 954.

⁹ *Peek v. North Staffordshire Railw. Co.*, 9 Jur. (N. S.) 914; s. c., 10 Ho. Lds.

§ 174. A condition exempting the carrier from all responsibility is unreasonable, and so is a condition that the carrier shall not be responsible for any damage unless pointed out at the time of delivery by the carrier.¹⁰ The burden of showing the reasonableness of a condition annexed to the carrier's undertaking rests upon such carrier.⁹

§ 175. It was held in one case,¹¹ that as carriers were bound to carry for all who applied, and on reasonable terms, they could not make a condition excusing them from all responsibility for packages insufficiently packed.

§ 176. So, also, a condition on cattle tickets, that the carrier shall be free from all risk or responsibility with respect to any loss or damage arising in the loading or unloading, or in the transit, from any cause whatever, it being agreed that the animals are carried at the owner's risk, and that he is to see to the efficiency of the wagon before the stock is placed therein, and complaint to be made in writing to the company's agent before the wagon leaves the station, is neither just nor reasonable;¹² and such a special contract cannot be maintained under the English statute, and it would seem ought not to be regarded as fairly and freely entered into by the owner, in the absence of all statutory provision.

§ 177. Where cattle carried beyond the place of destination, and being out of condition, are injured in the sense of that term, under the English statute, and unquestionably so under the general responsibility of the carrier, the carrier cannot excuse himself by a general contract with the owner to be relieved from all responsibility for dam-

Cas., 473; *Aldridge v. Great Western Railw. Co.*, 15 C. B. (N. S.) 582. It is here held that a carrier is not to be regarded as a mere gratuitous bailee in carrying back vessels free of charge, by contract, at the time of carrying them filled for pay.

¹⁰ *Lloyd v. Waterford & Limerick Railw. Co.*, 9 Law T. (N. S.) 89, 15 Ir. Com. L. 37; *Allday v. Great Western Railw. Co.*, 11 Jur. (N. S.) 12.

¹¹ *Garton v. Bristol & Exeter Railw. Co.*, 1 El. Bl. & S. 112; s. c., 7 Jur. (N. S.) 1234.

¹² *Gregory v. West Midland Railw. Co.*, 2 H. & C. 944; s. c., 10 Jur. (N. S.) 243.

age in overcarriage, delay, or in the conveying or delivery of said animals.¹³

§ 178. At the plaintiff's request, the employees of a railway company, contrary to their general instructions, attached his freight car to a passenger train, he agreeing "to run all risks." Owing to an accident, occurring through the negligence of the company's servants, and not, to any extent, caused by attaching the freight car, the plaintiff received an injury, and the company were held responsible, the plaintiff's risk being assumed solely with reference to the effects of attaching the freight car.¹⁴

§ 179. And where the defendants, carriers in India, contracted with the government, by which troops were to be transported, but their luggage, among which were plaintiff's goods, were to remain in charge of a military guard, the company accepting no responsibility. The goods were destroyed by the company's negligence and they were held responsible, as for a breach of duty, for any loss occurring through their own negligence, while the goods were in their possession.¹⁵

¹³ *Allday v. Great Western Railw. Co.*, 11 Jur. (N. S.) 12.

¹⁴ *Lackawana etc. Railw. v. Cheneworth*, 52 Penn. St. 382.

¹⁵ *Martin v. Great Indian Pen. Railw.*, Law Rep. 3 Exch. 9.

CHAPTER XIV.

RESPONSIBILITY FOR CARRIAGE BEYOND COMPANY'S ROAD.

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| <p>§ 180. <i>English rule to hold first company liable to the end of the route.</i></p> <p>§ 181. <i>This rule not followed in the American courts.</i></p> <p>§ 182. <i>But company may undertake for whole route.</i></p> <p>§ 183. <i>This is presumed when they are connected in business.</i></p> <p>§ 184. <i>Case of refusal to pay charges demanded, and return of goods before reasonable time.</i></p> | <p>§ 185. <i>Carriers only responsible for safe carriage and delivery to next carrier according to ordinary usage.</i></p> <p>§ 186. <i>Must follow special directions.</i></p> <p>§ 187. <i>Makes no difference that part of line is by boat and part by railway.</i></p> <p>§ 188. <i>English rule as to implied contract for the entire route.</i></p> <p>§ 189. <i>Receiving freight for entire route binds to that extent unless proof be given to rebut that implication.</i></p> |
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§ 180. THE disposition of the English courts, since the establishment of railways, has seemed to be to regard parties who receive goods, and book them for a certain destination, as carriers throughout the entire route.¹ Since the first case which assumed this position,² there has not been manifested any disposition to recede from it.³ And the English courts have extended the same rule to carriers in England, in the direction of Scotland, where the goods are received and booked for points beyond the limits of England.⁴ And this rule has been carried so far in the English courts that even where the loss is shown to have occurred upon one of the subsequent roads in the route, it is held that the contract is exclusively with the first com-

¹ Hodges on Railways, 615.

² Muschamp v. Lancaster & Preston Railw., 8 M. & W. 421.

³ Watson v. Ambergate, Not., & Boston Railw., 15 Jur. 448; s. c., 3 Eng. L. & Eq. 497; Scotthorn v. South Staffordshire Railw., 8 Exch. 341; s. c., 18 Eng. L. & Eq. 553; Wilson v. York, N., & B. Railw., 18 Eng. L. & Eq. 557.

⁴ Crouch v. London & Northwestern Railw., 14 C. B. 255; s. c., 25 Eng. L. & Eq. 287.

pany, and that there is no right of action in favor of the owner against any of the subsequent companies on the route.⁵ The same rule is adopted in regard to passenger baggage.⁶ It seems to us, that by reason of the pressure of two questions in the case last named, the House of Lords, after great labor and pains, have really escaped from a threatening dilemma by falling into more difficulty and doubt, not to say confusion, than either of the alternatives of the original dilemma presented. There was no difficulty in saying that an exemption from responsibility for loss by fire, contained in a receipt-note given by the first company, by fair construction extended to the entire route, although contained only in the written contract with the first company. But the Court of Queen's Bench and the Exchequer Chamber differed upon this point. There would have been more reason in saying, as the American courts do, that the first company is not responsible for the miscarriage of the other companies. But the court of last resort in England have now put the crowning climax upon this rule, by saying that subsequent companies are not responsible as carriers to the owner of the goods. This is a rule which some of the learned judges dissent from, and which others adopt upon the ground of the written contract in this case; and which we should expect would be ultimately abandoned, as founded upon no fair principle of reason or justice. But if the law of England is altered in this respect, it must be by statute, as the House of Lords will not hear argument upon a point once determined in that court. The difficulty seems to have arisen out of the extreme views adopted there in *Muschamp v. Lancaster & Preston Railway*.² And in a later case,⁷ where oxen were sent from the Craven Arms station on the Shrewsbury and Hereford Railway to

⁵ *Bristol & Exeter Railw. v. Collins*, 7 Ho. Lds. Cas. 194; s. c., 5 Jur. (N. S.) 1367. See *post*, n. 8.

⁶ *Ante*, ch. ix., n. 3.

⁷ *Coxon v. Great Western Railw. Co.*, 5 H. & N. 274.

Birmingham, that company's line extending to Shrewsbury, and the defendants' from that to Birmingham, the plaintiff's drover signed a way-bill containing the following condition: "For the convenience of the owner the company will receive the charges payable to other companies for conveyance of the cattle over their line of railway, but the company will not be subject to liability for any loss, delay, default, or damage arising on such other railway." One sum was charged for the carriage, which was to be paid at Birmingham. The oxen were placed in trucks belonging to the defendants, and on the arrival of the train at Wolverhampton, on defendants' line, it was found that the bottom of one of the trucks was broken, and one of the oxen dead, and others injured. It was held that the contract was so exclusively with the Shrewsbury and Hereford Company for the entire journey that the defendants were not liable.

§ 181. But this rule has been very seriously questioned in this country. The general view of the American courts upon this subject is, that in the absence of special contract, the rule laid down in the earlier English cases,⁸ that the carrier is only liable for the extent of his own route, and for the safe storage and delivery to the next carrier, is the more just and reasonable one, and this is the doctrine which seems likely to prevail in this country, although there is no doubt some argument to be drawn from convenience in favor of the English rule.⁹

⁸ *Garside v. Trent & Mersey Navigation Co.*, 4 T. R. 581.

⁹ *Farmers' & Mechanics' Bank v. Champlain Transp. Co.*, 16 Vt. 52; 18 Vt. 131; 23 Vt. 186; *Van Santvoord v. St. John*, 6 Hill (N. Y.), 158; *Hood v. New York & N. H. Railw.*, 22 Conn. 1; s. c., 22 Conn. 502; *Nutting v. Conn. R. Railw.*, 1 Gray, 502; *Jenneson v. Camden & Amb. Railw.*, Dist. Court Phil. 4 vol. Am. Law Reg. 234. *Stroud, J.*, in this last case, reviews all the cases upon the subject, and concludes, that in this country the courts have held, that when goods are delivered to a carrier marked for a particular place, but unaccompanied by any other directions for their transportation and delivery, except such as might be inferred from the marks themselves, the carrier is only bound to transport and

§ 182. There are many cases, where the American courts have held the carrier liable beyond the limits of his own

deliver them, according to the established usage of the business in which he is engaged, whether that usage were known to the other party or not.

The learned judge, in delivering his opinion, said: "The only question is whether this receipt contained an undertaking by the defendants to carry the chest beyond the terminus of their line, or, rather, beyond the place named in the receipt, the 'office of the defendants, in New York.'

"The language of the receipt is plain and positive, — 'which we promise to deliver at our office in New York, upon payment of freight therefor at the rate of 26½ cents per 100 lbs.' For what purpose the memorandum, 'to be shipped for Camden, Ohio, from New York,' was made, we are not called upon to determine. We do determine that it did not enlarge the defendants promise, as set forth in the body of the instrument; that it does not import an agreement by the defendants, that they would transport the chest to Camden, Ohio, and then deliver it to the plaintiff, which is the allegation in the declaration. It was admitted by the plaintiff's counsel that the chest was safely carried to New York, that it had been put in the way of transportation to its destination, by delivery to a proper railway transportation company for that purpose, but what became of it afterwards could not be ascertained.

"Questions very similar to that which has here arisen, have occurred several times in England, and in some of our sister States. *Muschamp v. The Lancaster & Preston Junction Railw. Company*, 8 Mees. & Wels. 421, was the case of a parcel delivered at Lancaster, addressed to a place in Derbyshire, beyond the line of the Lancaster and Preston Railway. Baron *Rolfe*, before whom the cause was tried, told the jury, that a carrier who takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, undertakes *primâ facie* to carry the parcel to its destination, and that the rule was not varied by the fact that that place was beyond the limits within which the carrier professed to carry. This ruling was sanctioned by the court in *banc*.

"In a subsequent case, *Watson v. The Ambergate, Nottingham, & Boston Railw. Company*, 15 Jur. 448; s. c., 3 Eng. L. & Eq. 497, the decision in *Muschamp v. The Lancaster*, etc. was approved.

"In this country the courts have held, that when goods are delivered to a carrier, marked for a particular place, but unaccompanied by any other directions for their transportation and delivery except such as might be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether that usage were known to the party from whom they were received or not. *Van Santvoord v. St. John*, 6 Hill (N. Y.), 157; *Farmers' and Mechanics' Bank v. Champlain Transportation Co.*, 18 Vt. 140, and 23 id. 209.

"In *Nutting v. Connecticut River Railroad Co.*, 1 Gray, 502, a receipt was given of this description: 'Northampton, Mass., received of E. Nutting for transportation to New York, nine boxes planes, marked,' etc. Two of these boxes were lost between Springfield, Mass., and New Haven, Conn., being beyond the terminus of the defendants' road. No connection in business was shown to

route, upon the ground of a special undertaking, either express or implied, but whether any such contract exists exist between the defendants and the proprietors of the connecting road, nor was pay taken for the transportation beyond Springfield, which was the terminus of the defendants' road.

"The Supreme Court of Massachusetts held, that the true construction of this contract was, that the goods should be safely carried to the terminus of the defendants' road, and there delivered to the carriers on the connecting road, to be forwarded to their proper destination. This decision was made upon a case stated. *Muschamp v. Lancaster & Preston Junction Railw.*, 8 M. & W. 421, was cited on behalf of the plaintiff, but the court disapproved of that decision, and held that, to bind a company under the circumstances of this case, the burden was upon the plaintiff to show a special contract by the company to carry the goods beyond the terminus of its own railway. There is another case which was cited, on the argument before us, by the counsel of the defendant. In this it was decided by a divided court, that, where a passenger paid the fare to a point several miles beyond the terminus of the defendants' railroad, receiving from the conductor of the cars a ticket in this form: 'New Haven and Northampton Company — Conductor's Ticket — New Haven to Collinsville by stage from Farmington,' — the company was not responsible for any injury sustained by the passenger on the stage road between Farmington and Collinsville. The case was tried twice. A new trial was granted after the first trial, on a ground corresponding with that taken in *Nutting v. The Connecticut River Railroad Company*, 1 Gray, 502; but, after the second trial, in which the verdict was, as it had been on the first, for the plaintiff, the court, in setting aside the second verdict, rested its opinion on the ground that the conductor had no authority to bind the company to carry beyond the limits of its railway, because the company itself could not make any such binding contract. *Hood v. N. Y. & N. H. Railroad Co.*, 22 Conn. 1, 502.

"The case before us does not require, in support of the conclusion to which we have come, the adoption of the rulings in any of the cases in our sister States which have been referred to. The nonsuit on the trial was placed distinctly upon the principle that the evidence did not support the declaration; that the *alegata* and *probata* did not agree. The declaration alleged that the goods were to be carried from Burlington, New Jersey, to Camden, Ohio; whereas the receipt was express, that they were to be delivered at the company's office at New York, and the charge of freight was to New York only, and not beyond."

In the case of *United States Express Company v. Rush*, 24 Ind. 403, the plaintiffs in error received a package of money to be carried to a point beyond their route. They carried it to the point on their route nearest the point of destination, and delivered it to "Winslow's Express," the usual communication from that point to the place of destination, and the package was lost while in their custody. The plaintiffs' receipt for the package specified that they undertook to forward the package to the point nearest its destination reached by that company, and that they should be held liable as forwarders only. It was held, the plaintiffs might become liable as common carriers without compliance with the statute declaring express companies common carriers, but that having done all which their contract

is regarded as a matter to be determined from all the facts and attending circumstances of the case, and will more generally be an inference for the jury than the court, unless it depends upon the effect of written stipulations, and even then will often be affected more or less by attending facts and circumstances.¹⁰

required they were not responsible further. Where a ticket, sold by a railway company to a point upon a connecting road, contained a printed stipulation that in selling the company acted as agent only for roads beyond the terminus of their road, and assumed no responsibility therefor, the company is not liable to a passenger for the loss of baggage not occurring upon the line of their own road. *Penn. Cent. Railw. v. Schwarzenberger*, 45 Penn. St. 208. See also *Hunt v. N. Y. & E. Railw.*, 1 Hilton, 228; *Dillon v. Same*, id. 231.

In the recent case of *Converse v. Norwich & N. Y. Transportation Co.*, 33 Conn. 166, where the defendants received goods for transportation beyond their own line, which was confined to the water, the goods being addressed to S., and receipted by the defendants as "goods bound for S.," that point being reached by railway, after the termination of defendants' line, there being a usage known to the shipper, to carry through freight, at reduced prices, by virtue of an arrangement for that purpose between the defendants and the railway company, and the proceeds divided between the two companies in certain proportions, a bill for the through freight being made out, and collected and receipted for by the railway company, at the place of delivery, it was decided that as there was no unexplained evidence, that the defendants held themselves out as carriers throughout the entire line to S., and no express contract to carry to S., the defendants' contract was performed on delivery to the railway company.

But in *Peet v. Chicago & Northwestern Railw.*, 19 Wisc. 118, where the defendants, whose line terminated at Chicago, receipted for one hundred barrels of flour at Neenah, on their own line, "contract from Neenah to New York at \$2.25 per barrel," it was held that the contract was to deliver the flour in New York, and the company were responsible as common carriers for the entire route.

And where separate companies are engaged in a common undertaking for the transportation of freight over a long line, of which each associate forms a link giving through bills of lading and charging through freight, each will be liable as a common carrier for the whole distance. *Cin., Ham., & Day. Railw. v. Spratt*, 2 Duvall, 4.

But where the receipt or bill of lading contains express notice that the first company will not be responsible as carriers beyond their own line, the fact that it extends to the entire route will not render them responsible as common carriers beyond their own limits. *Detroit & Milw. Railw. v. Farmers' Bank*, 20 Wisc. 122.

¹⁰ *Weed v. Sar. & Sch. Railw.*, 19 Wend. 534; *Bennett v. Filyaw*, 1 Flor. 403. The Laurens railway company gave receipts for cotton "to be delivered on presentation of this receipt at Charleston." The cotton reached the terminus of the Laurens railway in safety, and there, without bulk being broken, was delivered in the same cars to the Greenville & Columbia railway to be carried on.

§ 183. The American cases upon the subject, with rare exceptions, recognize the right of a railway company to enter into special contracts to carry goods beyond the line of their own road. And where different roads are united in one continuous route, such an undertaking, in regard to merchandise received and booked for any point upon the line of the connected companies, is almost matter of course. It is, we think, the more general understanding upon the subject, among business men and railways, their agents and servants.¹¹ And this is so, although the con-

It was afterwards lost. Held, that the Laurens railway company were liable, their undertaking being special to carry to Charleston. *Kyle v. Laurens Railw.*, 10 Rich. (S. C.) 382. See *Kreuder v. Woolcott*, 1 Hilton, 223; Ill. Cent. Railw. v. Copeland, 24 Ill. 332; *Same v. Johnson*, 34 Ill. 389.

¹¹ *Noyes v. Rut. & Bur. Railw.*, 27 Vt. 110; *Wilcox v. Parmelee*, 3 Sandf. 610; *Ackley v. Kellogg*, 8 Cowen, 223. Note of Editors to Am. Law Reg. 4 vol. 238, *et seq.* where this subject is very elaborately and very satisfactorily discussed. See *Bradford v. S. C. Railw.*, 7 Rich. 201; *Mar. Mutual Ins. Co. v. Chase*, 1 E. D. Smith, 115; *Mallory v. Bennett*, id. 234.

In a late English case, *Collins v. The Bristol and Exeter Railw.*, 11 Exch. 790; s. c., 36 Eng. L. & Eq. 482, a carrier of goods had intrusted them to the Great Western Railw., to be carried from Bath to Torquay. To accomplish the transit, the goods must pass over three railways, the defendants' company being one, and the goods were burned upon their line. The receipt-note, or bill of lading, given by the Great Western Railway, specified that the company were not to be answerable for loss by fire. The carriage was paid for the whole distance to the Great Western Railway.

The defendants entered into a rule, at the trial, to take no advantage of the action not being brought against the Great Western Railway.

Alderson, B., said, "We think the contract for the conveyance of the van of furniture was one contract, and that it was made with the Great Western Company alone. They contracted, in express terms, upon the face of the receipt-note, to carry the goods from Bath to Torquay. We think, therefore, there was a contract by the Great Western Company to carry the goods the whole way to Torquay, and, of course, the condition as to fire extends to, and protects from such loss, during the entire journey. And this is in exact conformity with the judgment of this court, in *Muschamp v. The Lancaster & Preston Junction Railw. Company*, which has been frequently confirmed and acted upon in all the courts of Westminster Hall. We therefore think that no action is maintainable against any of the companies, and a nonsuit ought be entered." But this case is reversed in the Exchequer Chamber, 1 H. & N. 517; 28 Law Times, 260; s. c., 38 Eng. L. & Eq. 593. In the House of Lords it was held that the judgment of the Court of Exchequer was right and ought to have been affirmed. 5 H. & N. 969; 5 Jur. (N. S.) 1367.

nection among such roads is only temporary, and merely incidental, for the convenience of transacting business, one road acting sometimes as agent for other roads, by their procurement or adoption.¹² And if it be the usual course

¹² *Wibert v. New York & Erie Railw.*, 2 Kernan, 245, 255. In this case, *Hand, J.*, said, "There has been some question how far one railroad can be sued for the negligence of another, where the transportation is continuous and entire over their respective roads. See *Weed v. Saratoga & Sch. Railw.*, 19 Wend. 534; *St. John v. Van Santvoord*, 25 id. 660; s. c., 6 Hill, 157; *Muschamp v. Lancaster & Preston Junction Railw.*, 8 M. & W. 421; *Crouch v. London & N. W. Railw. Co.*, 14 C. B. 255; 1 *Parsons on Cont.* 686-87, and notes; *Champion v. Bostwick*, 18 Wend. 175; *Fromont v. Coupland*, 2 Bing. 170; *Russell v. Austwick*, 1 Sim. 52. In some of the cases above cited, the corporation to whom the property was first delivered was held liable for the default of other corporations, over whose lines the property was or should have been carried, and where a carrier is in the habit of receiving and forwarding goods directed to any particular place, an agreement on his part to take them has been presumed, but where their operations are entirely disconnected there is no partnership. 6 Hill, 157. But in many cases in which different railroad corporations cannot be considered by the public strictly as partners, they may and often do act as agents of each other."

In 23 Vt. 209, it was said, "There has been an attempt to push one department of the law of carriers into any absurd extreme, as it seems to us, by a misapplication of this rule of the carrier being bound to make personal delivery. That is, by holding the first carrier upon a route consisting of a succession of carriers, liable for the safe delivery of all articles at their ultimate destination. *Muschamp v. The L. & P. Junction Railw. Co.*, 8 M. & W. 421, is the only English case much relied upon in favor of any such proposition, and that case is, by the court, put upon the ground of the particular contract in the case; and also that 'All convenience is in favor of such a rule,' and 'there is no authority against it,' as said by Baron *Rolfe*, in giving judgment. *St. John v. Van Santvoord*, 25 Wend. 660, assumed similar ground.

"But this court, in this same case (16 Vt. 52), did not consider that decision as sound law or good sense. And it has since been reversed in the Court of Errors. *Van Santvoord v. St. John*, 6 Hill, 158. And this last decision is expressly recognized by the court, 18 Vt. 131. *Weed v. Saratoga & Sch. Railw. Co.*, 19 Wend. 534, is considered by many as having adopted the same view of the subject. But that case is readily reconciled with the general rule upon the subject, that each carrier is only bound to the end of his own route, and for a delivery to the next carrier, by the consideration that in this case there was a kind of partnership connection between the first company and the other companies, constituting the entire route; and also that the first carriers took pay and gave a ticket through, which is most relied upon by the court. But see opinion of *Walworth, Ch.*, in *Van Santvoord v. St. John*, 6 Hill, 158. And in such cases, where the first company gives a ticket and takes pay through, it may be fairly considered equivalent to an undertaking to be responsible throughout the entire route. The

of the carrier's business to forward goods beyond his route by sailing vessels, he is not liable for not forwarding a particular article by steam-vessel, unless the direction to do so be clear and unambiguous.¹³

§ 184. In a very late case in the Court of Exchequer,¹⁴

case of *Bennett v. Filyaw*, 1 Florida, 403, is referred to in *Angell on Carriers*, § 95, n. 1, as favoring this view of the subject.

"The rule laid down in *Garside v. Tr. & M. Nav. Co.*, 4 T. R. 581, that each carrier, in the absence of special contract, is only liable for the extent of his own route, and the safe storage and delivery to the next carrier, is undoubtedly the better, the more just and rational, and the more generally recognized rule upon the subject. *Ackley v. Kellogg*, 8 Cow. 223. This is the case of goods carried by water from New York to Troy, to be put on board a canal boat at that place, and forwarded to the north, and the goods were lost by the upsetting of the canal boat, and the defendants were held not liable for the loss beyond their own route. The cases all seem to regard this as the general rule upon the subject, with the exception of those above referred to; one of which (8 M. & W. 421), considers it chiefly a matter of fact, to be determined by the jury as to the extent of the undertaking; one (25 Wend. 660) has been disregarded by this court, and reversed by their own Court of Errors (6 Hill, 158); one (19 Wend. 534) is the case of ticketing through upon connected lines; and one (1 Florida, 403) I have not seen." See also *Nutting v. Conn. River Railw.*, 1 Gray, 502, and *Elmore v. Naugatuck Railw.*, 23 Conn. 457. One company, chartering one of their boats to another company for a single trip, but retaining the charge of it and of navigating it, were held liable to a passenger for the loss of his baggage. *Campbell v. Perkins*, 4 Selden, 430. In *Foy v. Troy & Boston Railw.*, 24 Barb. 382, it was held, that where goods were received by defendants at Troy, consigned to a person at Burlington, Vermont, it will be understood, in the absence of any proof to the contrary, as an undertaking to deliver the goods in the same condition as when received at the place of destination. And it is said in this case, that where property is so consigned, and is to pass over more than one road, that it is not the duty of the owner, in case of injury to his goods, to inquire how many different companies make up the line between the place of shipment and the place of delivery, or to determine, at his peril, which company was liable for the injury. It is also said here, that if the company receiving freight for transportation desires to limit its responsibility to injuries occurring upon its own road, it should provide for such limitation in its contract. In a late English case, *Willey v. The West Cornwall Railw.*, 30 Law Times, 261, the same propositions are maintained as in the case last cited, with the exception of the one last ruled, which did not arise. It is also said here, that the company are as much bound by a contract to carry beyond their own route, where the transportation is partly by water, as if it were all by rail, and that the company cannot defend upon the ground that a contract to carry beyond their own route is *ultra vires*.

¹³ *Simkins v. Norwich and New London Steamboat Co.*, 11 Cush. 102.

¹⁴ *Crouch v. Great Western Railw.*, 2 H. & N. 491. It is here held, that if a carrier contracts to carry goods to, and deliver them at a particular place,

the plaintiff sent a parcel by defendants, to "Reynolds, Plymouth," who took it to the end of their route, and then passed it on by another railway, as their agents, to the house of Reynolds, and demanded 2s. 3d. for its carriage. Payment of this sum was refused, and 1s. 6d. only offered. On the morning of the next day the parcel was returned to London, and on that day the consignee sent to pay the 2s. 3d. under protest; and obtain the parcel. He then made search for it in London and elsewhere, but it could not be found, and he brought this action for a conversion. The jury found a tender of the 2s. 3d. and a demand of the parcel, in a reasonable time, and that the parcel was returned to London before a reasonable time, and a consequent conversion. It was held that the facts justified the finding.

§ 185. Express companies have generally been held responsible only for the transportation to the end of their own line and careful delivery to the next company upon the route most direct to the destination of the parcel, with proper directions to the carrier to whom the parcel is successively delivered. And it has been said that where the goods, in such cases, are delivered to the carrier, marked for a particular destination without any specific instructions in regard to the transportation more than what is to be inferred from the marks on the package, the carrier is only bound to transport and deliver them according to the established usage of the business, whether that be known to the consignor or not. Consequently, where goods were

his duty at that place is precisely the same, whether his own conveyance goes the entire way, or stops short at an intermediate place, and the goods are conveyed by another carrier; and the carrier, or his clerk, at the place of destination, is the agent of the original carrier for all purposes connected with the conveyance and delivery and dealing with the goods, as his own clerk would have been at the place where his own conveyance stops. *Ante*, § 119.

Bramwell, B., who dissented from the decision in this case, says, in regard to the case of *Scotthorn v. South Staffordshire Railw.*, 8 Exch. 341, *post*, ch. xvi., "I reserve to myself the right to question its correctness on a fitting occasion."

Public policy in this country is unfavorable to an intermediate carrier's assuming the character of forwarder. *Ladue v. Griffith*, 25 N. Y. 364.

sent from Detroit, by an express company, to New York, and came into the hands of the defendant's agents at Suspension Bridge, and were carried to Albany and delivered to the Hudson River Railway, common carriers between that city and New York, giving proper instructions to the latter company, it was held that defendants were thereby exonerated from further responsibility.¹⁵

§ 186. Where special directions are given to a carrier in regard to the delivery of the goods, they must be followed, and if so, the carrier is exonerated from further responsibility. And where the company is accustomed to receive instructions as to goods to be carried beyond their own route, and the instructions are not obeyed, the carrier is liable for any loss or damage.¹⁶

§ 187. And it makes no difference as we have seen that

¹⁵ *Hempstead v. New York Central Railw.*, 28 Barb. 485. And in the case of *McDonald v. Western Railw.*, 24 N. Y. 497, the rule of law is thus declared: Where goods are shipped and must pass through the hands of several intermediate carriers before reaching their destination, it is the duty of each to carry to the end of his own route, and, except the last, to deliver to the next carrier, and he will not excuse himself from responsibility by putting the goods in warehouse without any effort to have them go forward to their ultimate destination. And it is the duty of the owner of the goods to have them properly marked, and to present them to the carrier or his proper servants for that purpose to have them properly booked, and if by his neglect in this respect a wrong delivery and consequent loss occurs, without the fault of the carrier, the owner must bear the loss. But if the wrong delivery, even in such case, is the fault of the carrier, he is responsible, and cannot urge the default of the owner in defense, if notwithstanding that he might have avoided the loss by proper diligence on his part. *The Huntress, Davies*, 82.

And where, goods being consigned beyond the first carrier's line, on their arrival at the termination of their line, the second carrier called for them, but the first carrier not being then ready to attend to the delivery, it was arranged, for the convenience of the parties, that the goods should remain in warehouse until the next morning, and in the mean time they were destroyed by fire, it was held, that the first carrier's responsibility continued until actual delivery to the next carrier. *Fenner v. Buffalo, etc. Railw.*, 46 Barb. 103.

¹⁶ *Michigan S. & N. Indiana Railw. v. Day*, 20 Ill. 375. And in a later case, *Illinois Central Railw. v. Johnson*, 34 Ill. 389, it was held, that railway companies, receiving goods marked for places beyond their line, are impliedly bound to see them carried to their destination, according to the English rule before stated. *Ante*, n. 11.

portions of the route are by steamboat and other portions by land where no railway exists. The English courts infer a contract to carry through.¹⁷ And in such cases where there is an agreement between the railway and steamboat lines to run in connection and divide the through freights, it was held both companies are jointly liable for the entire route.¹⁸

§ 188. Where a package is delivered to the agent of two connecting lines forming a continuous route, and the package is addressed to a person at the end of the route, and the agent alters the address so as to make it more obvious what course it is to be carried, as by writing "via Stafford" upon it, and delivers it to the first company on the route, it was held to be evidence of a contract by that company to carry the entire route.¹⁹

§ 189. The American rule in regard to an implied contract for the entire route seems to be, that where the freight for the entire route is reckoned in one sum, and a receipt given for the entire route, it will be regarded as *prima facie* evidence of an undertaking for the delivery at the ultimate destination of the goods. But this presumption is rebutted by proof, that there is, in fact, no partnership connection between the different companies, but only one of mere agency for the convenience of the business, and that this was known to the consignor, or might have been learned on reasonable inquiry.²⁰

¹⁷ Wilby v. West Cornwall Railw., 2 H. & N. 702.

¹⁸ Hayes v. South Wales Railw. Co., 9 Ir. Com. L. 474.

¹⁹ Webber v. Great Western Railw. Co., 3 H. & C. 771.

²⁰ Angle v. Mississippi etc. Railw., 9 Iowa, 487.

CHAPTER XVI.

POWER OF COMPANY TO CONTRACT TO CARRY BEYOND ITS OWN LIMITS.

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| <p>§ 190. <i>No doubt existed in regard to this power until very recently.</i></p> <p>§ 191. <i>Receiving freight across other lines and giving ticket through.</i></p> <p>§§ 192-194. <i>Cases reviewed upon this point.</i></p> <p>§ 195. <i>This may be shown by acts of company.</i></p> | <p>§ 196. <i>English courts hold company competent to contract to carry through entire route by sea and by land.</i></p> <p>§ 197. <i>But this must be by express contract, ordinarily.</i></p> |
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§ 190. It was for many years regarded as perfectly settled law, that a common carrier, which was a corporation chartered for purposes of transportation of goods and passengers between certain points, might enter into a valid contract to carry goods delivered to them for that purpose, beyond their own limits.¹ Most of the American cases do not regard the accepting a parcel, marked for a destination beyond the terminus of the route of the first carrier, as *prima facie* evidence of an undertaking to carry through to that point. But the English cases do so construe the implied duty resulting from the receipt.²

§ 191. But the cases, until a very recent one,³ do hold,

¹ *Ante*, ch. xv. and cases there cited; *Moore v. Michigan Central Railw.*, 3 Mich. 23.

² *Ante*, ch. xv. and notes. *Fairchild v. Slocum*, 19 Wend. 329.

³ *Hood v. New York and N. H. Railw.*, 22 Conn. 502. See *Elmore v. Naugatuck Railw.*, 23 Conn. 457. And in *Naugatuck Railw. v. Waterbury Button Co.*, 24 Conn. 468, it was held that a provision in the plaintiffs' charter, authorizing them to "make any lawful contract with any other railroad corporation in relation to the business of such road," only extended to contracts for the common use of such other roads as lay within the limits of plaintiffs' charter, and that it did not enable the company to enter into a contract to carry freight to the city of New York, either upon other railways or steamboats, and that such contract could not

that a railway company may assume to carry goods to any point to which their general business extends, whether within or without the particular state or country of their locality.⁴ And it has generally been considered, both in this country and in the English courts, that receiving goods destined beyond the terminus of the particular railway, and accepting the carriage through, and giving a ticket or check through, does import an undertaking to carry through, and that this contract is binding upon the company.

§ 192. The case of *Hood v. The New York and New Haven Railway*,³ assumes the distinct proposition that the conductor could not bind the company by such contract, because the company had no power to assume any such obligation. The case is not attempted to be maintained upon the basis of authority, but upon first principles, showing therefrom the innate want of authority in the company. It must be admitted the reasoning is specious; so plausible indeed, that if the matter were altogether *res integra*, it might be deemed sound.

§ 193. But it must be remembered that in the construction of all legislative grants, many things have to be taken, by implication, as accessory to the principal thing granted. And if we are not allowed to assume such indispensable incidents, as are necessary to the exercise of the powers conferred, in such a manner as to accomplish the main purpose in a reasonable and practicable mode, we shall necessarily be led into inextricable embarrassments. Hence we conclude this case may have assumed, possibly, too narrow grounds, and such as might render the principal grant of the company to become common carriers of freight and passengers, from New York to New Haven,

be inferred from the course of plaintiffs' business, and that having carried the goods to the end of their route and delivered them to the next carrier in the line of their destination, they were no further liable.

⁴ *Ante*, ch. xv., and notes.

less useful to the public, consistently with the security of the company, than the circumstances required. The strict and undeviating requirement in all cases, that all railways shall be restricted in their contracts for transporting persons, parcels, baggage, and goods, to the line of their own road, and a safe delivery to the next carrier, and that nothing like copartnership in the business of a particular route, consisting of different companies, could exist, would certainly be throwing serious hindrances in the way of business, without any adequate advantage.⁴

§ 194. And it was held, in a recent case by the Supreme Court of Vermont, that railway companies, as common carriers, might make valid contracts to receive freight at, or to convey it to, points beyond the limits of their own road, and thus become liable for the acts or neglects of other carriers, not under their control; and that in regard to matters not altogether beyond the general objects of their incorporation, and which, upon a liberal construction, might fairly be considered as embraced within them, it was not competent for the company to adopt the acts of their agents and officers so long as they proved beneficial, and when they proved otherwise, shield themselves from responsibility, by resorting to a more limited and literal construction of their corporate powers.⁵

⁵ *Noyes v. Rutland & Burlington Railw.*, 27 Vt. 110. The grounds of the decision are thus stated: "It seems to be now well settled that railway companies, as common carriers, may make valid contracts to carry beyond the limits of their own road, either by land or water, and thus become liable for the acts and neglects of other carriers in no sense under their control. *Muschamp v. Lancaster & Preston Junction Railw.*, 8 M. & W. 421; *Weed v. Saratoga & Schenectady Railw.*, 19 Wend. 534; *Farmers' & Mechanics' Bank v. Champlain Trans. Co.*, 23 Vt. 186.

"It has never been questioned that carriers, whether natural or artificial persons, might by usage or contract bind themselves to deliver parcels and merchandise beyond the strict limits of their line, in town and country; and in such case could only exonerate themselves by a personal delivery. 23 Vt. 186, and cases there cited.

"It seems to us, in principle, that these two propositions control the present case; for if a railway company may contract for carrying merchandise and par-

§ 195. And parol evidence that a railway company duly incorporated in one State has held itself out, through its agents, as a common carrier over a railway in another State, is sufficient *primâ facie* evidence of its capacity to contract for such carriage to support an action for merchandise intrusted to it.⁶

§ 196. The English courts hold that it is not *ultra vires* for a railway company to contract to carry beyond its own route, by sea or by coach.⁷ And where the party con-

ceals beyond the limits of their line, where the carriage is by porters, stages, by steamboats or other water-craft, or by other railways, and this is to be justified upon the ground of usage and convenience, or common understanding and consent, the same rule of construction must equally extend to contracts to receive freight at points on the line before it reaches the company entering into the contract. It may be true, in one sense, that this is extending the duties and powers of the company beyond the strictest interpretation of the words of their charter. But the time is now past, when, as between the company and strangers, any such literal interpretation of the charter is attempted to be adhered to. It is true that such corporations, even as to strangers, are not allowed to assume obligations altogether beyond the general objects of their incorporation, as if they should assume to build steamboats, or other railways, perhaps. But within the general business of their creation a very considerable latitude is allowed in contracts with strangers. This is done for the advantage of the company, as well as others, and to avoid embarrassments in the common business of life, which must be constantly liable to occur upon any such limited construction of the powers of corporations as is contended for by the plaintiffs below. These corporations are now held liable for a nuisance, in obstructing highways; — for damages, in consequence of a departure from the ordinary and safe mode of constructing their embankments, although attempted in that form to aid a manufacturing interest by making the embankment serve a double purpose of a dam and embankment for the track of the road. *Ante*, ch. iii. note 1; — and in many other cases, where, if the stockholders had interfered in the first instance, the agents of the company would have been restrained from doing the acts in the name of the company. But if the corporators acquiesce in the extension of the business of the company, even beyond the strict limits of its charter, upon the most literal interpretation, and strangers are thereby induced to contract upon the faith of the authority of the agents of such companies, the companies are not at liberty to repudiate the authority of such agents when their transactions prove disastrous.” And the principle of this case is maintained in *Hart v. Rensselaer & Sar. Railw.*, 4 Selden, 37; *Schroeder v. Hudson River Railw.*, 5 Duer, 55; *Peet v. Chicago & Northwestern Railw.*, 19 Wisc. 118; *Cin., Ham., & Day. Railw. v. Spratt*, 2 Duvall, 4; *Detroit & Mil. Railw. v. Farmers’ Bank*, 20 Wisc. 122; *Angle v. Miss. etc. Railw.*, 9 Iowa, 487.

⁶ *McCluer v. Manchester & Lawrence Railw.*, 13 Gray, 124.

⁷ *Wilby v. West Cornwall Railw.*, 2 H. & N. 703.

tracted with the company to carry beyond their own line upon a connecting road, but signed a note, without noticing its contents, only extending to the point of departure from the first line, it was held the parol evidence of the extended contract was admissible, as it only supplemented the writing.⁸

§ 197. There seems to be no question entertained by the American courts, that railway companies and other transportation companies, either corporations or joint-stock associations, may bind themselves to transport goods or passengers beyond their own lines. But in one recent case it was considered this must be by express contract.⁹ And in such case it is not material that the first company has no existing arrangement with other connecting lines for transportation beyond its own terminus.⁹ And it has been held, that railway companies may run steamboats beyond their own termini for the purpose of completing the natural transit of freight and travel,¹⁰ and if they do so, and hold themselves out as common carriers of freight and passengers for the entire route, they are bound to receive and carry all who require it and are ready to comply with the ordinary terms of transportation.¹⁰

⁸ *Malpas v. Southwestern Railw.*, Law Rep. 1 C. P. 336.

⁹ *Perkins v. Portland, etc., Railw.*, 47 Me. 573.

¹⁰ *Wheeler v. San Francisco & Alta Railw.*, 31 Cal. 46.

CHAPTER XVII.

AUTHORITY OF THE AGENTS AND SERVANTS OF THE COMPANY.

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| <p>§ 198. <i>Board of directors have same power as company, unless restricted.</i></p> <p>§ 199. <i>Other agents and servants cannot bind the company beyond their sphere.</i></p> <p>§ 200. <i>Owner may countermand destination of goods through proper agent.</i></p> <p>§ 201. <i>But an agent who assumes to bind the company beyond his sphere, cannot.</i></p> <p>§ 202. <i>Ratification of former similar contracts, evidence against company.</i></p> <p>§ 203. <i>Notice by company of want of authority in servants, renders their acts void.</i></p> | <p>§ 204. <i>Illustrations of the rule.</i></p> <p>§ 205. <i>Servant may bind company even when he disobeys their directions.</i></p> <p>§ 206. <i>Company responsible for the acts of servants of other companies.</i></p> <p>§ 207. <i>The authority of the agent not affected by receiving the compensation himself.</i></p> <p>§ 208. <i>The extent of agent's authority matter of fact.</i></p> <p>§ 209. <i>The owner of ship responsible for the acts of the master, notwithstanding a charter-party.</i></p> |
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§ 198. As the entire business of railways is of necessity transacted through the instrumentality of agents, the extent of their authority becomes a serious and important inquiry, as well for the stockholders as the public. As a general rule it may be safely affirmed that the board of directors have all the power which resides in the corporation, subject to such restrictions only as are imposed upon them by the charter and by-laws of the corporation.

§ 199. The other agents of the company are confined to their several spheres of operation. Thus station agents, who receive and forward freight, have power to bind the company, by a contract, that the goods shall be forwarded to a point beyond the terminus of the company's road (on the line of another railway), before a particular hour, and this, it would seem, notwithstanding a general notice has been published, that the company would not be responsible for forwarding goods beyond the terminus of their own road.¹ So, too, it has been held to be a proper ques-

¹ *Wilson v. York, Newcastle, & Berwick Railw.*, 18 Eng. L. & Eq. 557, in

tion to submit to the jury, under proper instructions, whether a particular servant, or officer, had not, under the circumstances, authority to bind the company.²

§ 200. So, too, it would seem, that any one having put goods, or baggage, upon the company's trains, or into their custody, is at liberty, at any time, to alter its destination, or resume the custody of it, unless, indeed it had been packed with other merchandise where it could not be removed, without unreasonable expense; and the station agent, who receives the goods or baggage, is competent to bind the company, by receiving a countermand, or new directions, to which he assents,³ as being in the line of his employment. His assent and promise to execute the order, may be regarded as evidence tending to show that the order was given to the proper person.

note. This was a case at Nisi Prius, before *Jervis*, Ch. J. The refusal of the station master, or of any one to whom he should refer the party, to deliver goods in his custody at the station, will bind the company, and if done without proper excuse, will render them liable in trover. *Rooke v. Midland Railw.*, 16 Jur. 1069; s. c. 14 Eng. L. & Eq. 175.

² *Scotthorn v. South Staffordshire Railw.*, 18 Eng. L. & Eq. 553; *Schroeder v. Hudson River Railw.*, 5 Duer, 55. It is often said that railway companies are responsible for the careless and negligent acts, but not for the willful and criminal acts of their agents. *De Camp v. Miss. & Mo. Railw. Co.*, 12 Iowa, 348. But the true inquiry is whether the agent was acting within the scope of his employment. If so his acts bind the company, whether willful or negligent.

³ Same case, where *Martin*, B., said: "A carrier is employed, as bailee of another's goods, to obey his directions concerning them; and I have no hesitation in saying, that generally, at any period of the transit, he may have them back. I think that if a traveller by railway is dissatisfied with his mode of travelling, he may at any point stop and require that his luggage should be delivered up to him.

"The station clerk had power to receive the countermand; and a loss having ensued from an omission to comply with that countermand, the defendants are bound to make that loss good."

So also where goods, carried by one company, arrived at the station of another company, the place of their destination, but that company refused to deliver them to the owner, he offering to pay all charges, on the ground that their contract with the other company, to deliver goods for them, did not include this class, being timber, and that they should therefore require the goods to be taken back upon the line of the other company, it was held to be a conversion. *Rooke v. Midland Railw.*, 16 Jur. 1069; s. c., 14 Eng. L. & Eq. 175.

§ 201. But where an agent of a railway company assumes to make a contract, in relation to the business of the company beyond the line of his ordinary employment, and especially where it is in contravention of the common course of the business of the company, or of their published rules and regulations, it will not bind the company.⁴ Thus it was held that a surgeon, who amputated the limb of a passenger, who was injured by the moving of a truck upon the railway, and the station agent had directed that "every attention" should be paid to such person, in consequence of which the surgeon performed the operation, could not recover of the company for his services, on the ground that it was not incident to the employment of such agent to bind the company by such contract.⁵

§ 202. But the fact that the company had ratified similar contracts, made by this same agent, might be evidence tending to show, that they had given this particular servant authority to make such, or similar contracts, but not that they had given authority to all their servants to do so.⁵

§ 203. If the company give notice that they will not be bound by the delivery of goods, "unless they were signed for by their clerks or agents," and this is known to

⁴ *Elkins v. Boston & Maine Railw.*, 3 Foster, 275. In this case the ticket-master and station agent of defendants received some parcels of goods of the plaintiff, and promised to forward them by the next passenger train, and the goods were lost. The plaintiff proved that in two instances, in the two years preceding, goods had been forwarded by the passenger trains, under the charge of some of defendants' servants, but it did not appear that freight was paid the company, or that they in any other way assented to it. See also *Norwich & Worcester Railw. v. Cahill*, 18 Conn. 484, where it is held the declaration of a director is good evidence of contract to bind the company. But testimony of this character is of almost infinite variety, in regard to its force and effect, and much of it, as in the case first cited in this note, is too remote to be much ground of reliance. To bind the company, the testimony should show a usage or continuous practice.

⁵ *Cox v. Midland Counties Railw.*, 3 Exch. 268; *Stephenson v. N. Y. & Harlem Railw.*, 2 Duer, 341.

the plaintiff, the company are not bound by a delivery in a different mode.⁶ But where the general freight agent was, by the by-laws of the company, intrusted with the power to negotiate contracts for the transportation of freight, with the approval of the president, it was held that this imported nothing more than that the president of the company might interfere to control the agent in making contracts, whenever he chose, but that unless he did so interfere, and neglected to apprise the public that all contracts for the transportation of freight must be ratified by him, the company would be bound by the acts of the agent.⁷

§ 204. But where trees were carried upon the company's trains, and the owner obtained leave to set them temporarily in the company's grounds, by permission of the station clerk, or of the general superintendent of the company, and both these persons subsequently refused to let the owner take them away, whereupon he applied to the managing director of the company, who also refused, and he brought trover against the company, the Court of Exchequer Chamber held it would lie.⁸ But where the servant of the company arrests a passenger for not paying fare, the company are not liable.⁹

⁶ *Slim v. Great N. Railw.*, 14 C. B. 647; s. c., 26 Eng. L. & Eq. 297. The authority of the agent to bind the carrier is always a question of fact, dependent upon the attending circumstances and the course of business. *Thomson v. Wells*, 18 Barb. 500.

⁷ *Medbury v. New York & Erie Railw.*, 26 Barb. 564. The company's agents cannot make admissions affecting its interests, except during the progress of their acts and as part of the transaction. *Fletcher v. Boston & Maine Railw.*, 1 Allen, 9. So also of an agent along the line of a railway as a night-watch, who, some days after cattle had been delayed, said he had forgotten the cattle, it was held not binding upon the company, and upon most unquestionable grounds. *Great Western Railw. v. Willis*, 18 C. B. (N. S.) 748.

⁸ *Taff Vale Railw. v. Giles*, 2 El. & Bl. 822; s. c., 22 Eng. L. & Eq. 202. The court say, "It is the duty of the company to have some person clothed with discretion, to meet any exigency that may arise, and to grant any reasonable demand."

⁹ *Eastern Counties Railw. v. Broom*, 6 Exch. 314; s. c., 6 Railw. C. 743; *Roe v. Birkenhead Railw.*, 7 Exch. 36; s. c., 6 Railw. C. 795.

§ 205. And it makes no difference, in regard to binding the company, that the agent disobeyed the direction of his superior, if he was acting within the scope of his employment at the time.¹⁰

§ 206. And in the case of a common carrier of goods, he is liable for the acts of all the servants of his subcontractor.¹¹

§ 207. And it will make no difference in regard to the responsibility of the carrier for the acts of his servants, that the emoluments derived from the particular transportation were, by arrangement between the carrier and the servants, allowed to be retained by the servants, as part of their compensation; unless this were known to the owner of the goods and he contracts with the servants, as principals.¹²

§ 208. The authority of the servants of a carrier is a question of fact to be determined by the jury, and the burden of proof rests upon the party claiming such authority.¹³ A mere messenger having charge of property sent by express is not necessarily authorized to make contracts to receive freight.¹³

§ 209. The owner of a vessel is not exonerated from

¹⁰ *Philadelphia & R. Railw. v. Derby*, 14 How. U. S. 468, 483. Nor will it excuse the company from liability because the disregard of duty on the part of the agent was willful. *Weed v. Panama Railw.*, 5 Duer, 193. So where a clerk having charge of the receiving of freight, at a wharf, informs the owner of goods, that one rate exists; when he had been instructed to demand a higher rate, for freight, it will bind the principal to the rate named. *Winkfield v. Packington*, 2 C. & P. 599.

¹¹ *Machu v. The London & Southwestern Railw.*, 2 Exch. 415; s. c., 5 Railw. C. 302. This case was where the company employed an agent to deliver parcels in London. They had been accustomed to send a delivery ticket, with each parcel, which was headed with the name of the company, and signed by the party employed by them to make the delivery, and contained the names of the porters of that party, one of which porters stole the parcel in this case. Held, that such porter is to be regarded as the company's servant, within the Carriers' Act.

¹² *Bean v. Sturtevant*, 8 N. H. 146. See *Sheldon v. Robinson*, 7 id. 157; *McLane v. Sharpe*, 2 Harrington, 481.

¹³ *Thurman v. Wells*, 18 Barb. 500.

responsibility for the acts of the master, on account of the existence of a charter-party, by which the charterers assume the responsibility of the voyage, so long as the owners remain in possession of the ship by their servants, the master and crew. And those who ship goods upon such vessel without knowing of the existence of the charter-party, may look to the owner to safely stow or pack the goods; and the fact that the charterers employed a stevedore to stow these particular goods will make no difference, the owner of the goods not being aware of such fact.¹⁴

¹⁴ Sandeman v. Scurr, Law Rep. 22 Q. B. 86. *Quere*; whether the charterers may not also be held responsible under the bills of lading signed by the master in furtherance of the charter-party.

CHAPTER XVIII.

LIMITATION OF DUTY, BY COURSE OF BUSINESS.

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| <p>§ 210. Carriers bound only to the extent of their usage, and course of business.</p> <p>§ 211. This question arises only when they refuse to carry.</p> <p>§ 212. Carriers and some others are bound to serve all who apply.</p> <p>§ 213. Duty under English Carriers' Act.</p> <p>§ 214. Usage to determine character of freight.</p> <p>§ 215. Carrier cannot transship freight except in cases of strict necessity.</p> | <p>§ 216. Proof of the ordinary results of same voyage admissible.</p> <p>§ 217. So also is the notoriety of the usages of trade and business.</p> <p>§ 218. Owner of goods bound to remove them on arrival, or carrier only responsible for actual negligence.</p> <p>§ 219. How far carrier bound to observe the usages of the port.</p> |
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§ 210. It seems to be an admitted principle in the law of carriers, that their obligations and duties may be restricted by the course of their business. They may limit it to the carrying of particular commodities. The business of common carriers is not one imposed upon any particular person, natural or artificial, and any one may undertake it, at will, and by consequence may enter upon so much of the entire business as he chooses.¹ In the absence of any special contract, the obligation of a carrier of goods is to carry them by the usual route professed by

¹ Farmers' & Mechanics' Bank v. Champlain Transportation Co., 23 Vt. 186. Opinion of Daniel, J., in N. J. Steam Navigation Co. v. Merchants' Bank, 6 How. U. S. 344. If any illustration or authority were needful upon this point, it might very readily occur to any one reflecting upon the subject. An express company are no doubt liable as common carriers, but are not compellable to carry such articles as are never expected to be sent or carried by express, as, for instance, articles of great bulk and weight. It would certainly be a novelty to require an express company to transport coal, salt, iron, and lead in pigs, etc.

But practically the increased price of this mode of transportation will protect the companies from these extraordinary demands, and they have the right also to demand the protection of the law as well as other persons from liability to such intrusion.

him to the public, and to deliver them within a reasonable time.² And there is no obligation upon a railway company to carry goods otherwise than according to their public profession.³

§ 211. But this distinction is of no practical importance, except where carriers refuse to carry certain kinds of goods, or to carry them except upon certain conditions excusing their general common-law responsibility, and suit is brought for the refusal. In such cases it is believed the carrier is not liable for an absolute refusal to carry goods wholly out of the range of his ordinary business, unless where the carrier is a corporation chartered, with the powers, and for the purpose, of becoming common carriers in general, and in such cases even, it seems the better opinion, that unless restrained by the express terms of their charter, such companies have the same liberty, as to the extent of their business, as natural persons.⁴ In this last case the language of *Parke, B.*, is pertinent. "The question is whether the defendants are, under the circumstances of this case, bound to carry coals from Milton to Oakham. If they are merely in the situation of carriers, at common law, they are not bound, for they have never professed to carry coals from or to those places. At common law a carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession." He then cites at length the words of *Holt, Ch. J.*, in *Lane v. Cotton*, 12 Mod. 484, in regard to the general duty of all who undertake to serve the public in any particular business to serve all who come, citing the cases of blacksmiths,⁵ innkeepers,⁶ and common carriers.

² *Hales v. London & Northwestern Railw. Co.*, 4 B. & S. 66.

³ *Oxlade v. Northeastern Railw. Co.*, 15 C. B. (N. S.) 680.

⁴ *Johnston v. Midland Railw.*, 4 Exch. 367; s. c., 6 Railw. C. 61; *Sewall v. Allen*, 6 Wend. 335; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16.

⁵ *Keilway*, 50, pl. 4, cited in note to *Lane v. Cotton*, 12 Mod. 484, and in note to *Parsons v. Gingell*, 4 C. B. 555.

⁶ *Dyer*, 158, Godb. 346. But it seems to be conceded by the learned Baron

§ 212. In the case of an innkeeper there is no question that the action will lie. So also in the case of a carrier, and that arises from the public profession which he has made. A person may profess to carry a particular description of goods only, for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places.

§ 213. In regard to the effect of the act of Parliament, the learned judge says: "I think that no obligation is cast upon the company to undertake the duties of carriers altogether, and on every part of their line, but that they may carry some goods on one part of the line and not on others." That act in terms enabled that company to become carriers, but did not oblige them to do so. Hence it is said, "They are not bound to carry to or from each place on the line, or every description of goods."⁷

§ 214. Evidence of the prevailing usage among manufacturers, dealers, and carriers, may be resorted to for the purpose of determining whether sawed marble, in slabs, is to be rated as unwrought marble.⁸

§ 215. Carriers by steamboat are not justified in the transferment of freight except in cases of strict necessity,

here, that the instance which he cites of the smith being bound to shoe all the horses of the realm which come to him, is at least rendered questionable by the note to *Parsons v. Gingell*, 4 C. B. 545. And this liability to action for refusal to serve another in one's business, undoubtedly, is confined to carriers of goods and passengers, and innkeepers, in regard to which the learned judge insists there never was any question. *Lane v. Cotton*, 12 Mod. 472, 484.

⁷ It is said there must be either a special contract or a general usage to carry the particular kind of goods, to render the party liable for not carrying. *Tunnell v. Pettijohn*, 2 Harr. 48; *Bennett v. Dutton*, 10 N. H. 481. But if the party undertake the carriage, although he had not been accustomed before to carry that kind of goods, he is liable, as a common carrier, if that is his general business, unless he make a special acceptance. See the cases cited above, and *Powell v. Mills*, 30 Miss. 231.

⁸ *Bancroft v. Peters*, 4 Mich. 619.

and if done except in such case, it will subject the carrier to responsibility for the subsequent loss of the freight upon the vessel to which it is transferred. The mere fact that a steamboat upon an inland river is grounded, from which she might relieve herself, with safety and convenience, by temporarily unloading a part of the cargo upon the shore, and then replacing it on board after the vessel was afloat, and thus completing the voyage, is no ground for the transshipment of the whole cargo.⁹

§ 216. In the case of goods transported by sea, it has been held competent to prove the common result of transporting goods the same voyage, whether they usually arrive in a safe or damaged condition, as a ground of presumption of negligence, or the contrary.¹⁰ But we should apprehend that, generally, it must be assumed that transportation by sea or land would not be undertaken or continued, unless, in the common run, the goods might be expected to reach their destination in safety. And unless protected by his own contract, the carrier would be responsible for all damage, whether with or without his fault.

§ 217. In a recent English case, in regard to equality of charges on packed parcels, it became material to prove that the carriers had knowledge of the practice of sending packed parcels in bulk, and then distributing them upon arrival at their destination. The following question and answer were raised at the trial, and approved by the full bench: "Has this practice been notorious?" It was answered that, for the last forty years, it had been so general as to be notorious among carriers.¹¹

§ 218. There is no doubt the owner of goods consigned by railway is bound to take notice of the course of the busi-

⁹ Cox, Brainerd, & Co. v. Foscue, 37 Ala. 505.

¹⁰ Steele v. Townsend, 37 Ala. 247.

¹¹ Sutton v. Southeastern Railw. Co., 11 Jur. (N. S.) 935. It was decided in this case that the court will not grant an injunction before trial to restrain an overcharge by a railway company for packed parcels.

ness and call for them at the ordinary time of arrival,¹² and if he do not remove them on arrival, or within a reasonable time thereafter, the company will only be responsible for ordinary neglect, and on proof of the goods being stolen, but with no evidence of want of ordinary care, the plaintiff cannot recover, and it is not error for the judge to direct a verdict for the defendant.¹³

§ 219. But the usages of a particular port, as to the manner of landing goods, it has been held, is not binding upon shippers from another port, unless known to them, or in some way presumptively assented to.¹⁴ But it is said in *Farmers' and Mechanics' Bank v. Champlain Transportation Co.*,¹⁵ "the course of business at the place of destination, the usage or practice of the defendants and other carriers, if any, at that port and at that wharf, become essential and controlling ingredients in the contract itself." And we apprehend that every one in sending goods from one port or place to another expects to be bound by the usages of the place of destination and the general practice of the carriers there. But where these are in contravention of the common and general usages of the business, it should very clearly appear that they exist, and are of uniform observance, and not unreasonable in character,¹⁶ and that they were known, or might and ought to have been known, to the carrier.

¹² *Blumenthal v. Brainerd*, 38 Vt. 402.

¹³ *Lamb v. Western Railw.*, 7 Allen, 98.

¹⁴ *Steamboat Albatros v. Wayne*, 16 Ohio, 513.

¹⁵ 23 Vt. 186, 208.

¹⁶ *Dixon v. Dunham*, 14 Ill. 324.

CHAPTER XIX.

STRANGERS BOUND BY COURSE OF BUSINESS AND USAGES OF TRADE.

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| <p>§ 220. <i>Those who employ railway companies bound to know the manner of transacting their business.</i></p> <p>§ 221. <i>General usages of trade presumed to be familiar to all.</i></p> | <p>§ 222. <i>Contracts for transportation contain, by implication, known usages of the business.</i></p> |
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§ 220. QUESTIONS of some difficulty often arise in regard to the effect of usage in the carrying business. If it is understood, as applicable to railways, as synonymous with the general course of transacting the business of carriers, by railway companies, then those who employ them are undoubtedly bound to take notice of it.¹

¹ *St. John v. Van Santvoord*, 25 Wend. 660; s. c., 6 Hill, 157. This case, perhaps, illustrates this subject about as well as any one. In the Supreme Court it was considered that had the owners of the goods known that defendant was not a carrier beyond Albany, he would only have been bound to the end of his route; but as this was not known to the owners, and defendants gave a general receipt, describing the box by its mark, "*J. Petrie, Little Falls, Herkimer Co.*," the plaintiffs were at liberty to infer they were carriers to that point, and therefore they were responsible for its safe delivery at its destination.

This decision was reversed in the Court of Errors; and Chancellor *Walworth*, delivering the leading opinion, said: "If the owner of the goods neglects to make the necessary inquiry as to the usage and custom of the business, or to give directions as to the disposal of the goods, it is his own fault, and the loss, if any, after the carrier has performed his duty, according to the ordinary course of his trade and business, should fall upon such owner, and not upon the common carrier."

The Chancellor argues further, that, from the circumstances, the plaintiffs had no right to expect a personal delivery by the defendant, and therefore the law did not require it. In the case of *Gibson v. Culver*, 17 Wend. 305, Justice *Cowen* seems to suppose that the carrier by stage-coach is, in the first instance, bound to personal delivery, and that, in order to exonerate himself from that obligation, he

§ 221. The usages of any particular trade, such as are uniform or general, are presumed to be familiar to all persons having transactions in that trade or business; and all parties making contracts upon any subject, leave to implication merely such incidents as are presumed to be familiar to both parties, and in regard to which there cannot ordinarily be any misunderstanding.

§ 222. The same is eminently true of the carrying business, upon the great thoroughfares of the country. Contracts are made, by way of memorandum merely; and to a jury, who know nothing of the usages and course of business in such transactions, would be quite unintelligible, and could only be made to express the real purpose of the parties, in connection with such usages and course of business as is presumed to be in the minds of the parties at the time of entering into the contract. And if one of the parties assumes to transact such business, in ignorance of the very elementary usages of the business, he is not allowed to gain an unjust advantage of the other party by means of his own voluntary or rash ignorance, nor is the other party at liberty to take advantage of such ignorance and inexperience (when made known to him) to induce such inexperienced one to assume an unequal risk on his part. But must show a custom or usage of such notoriety as to justify the jury in finding that it was known to the plaintiffs, in order to excuse the carriers.

But it should be noted that this was as far as it was necessary to go in this case in order to excuse the carrier, and it is therefore not certain how far the court might have gone here if the facts had required it. For in 6 Hill, 158, this view is altogether repudiated, and the more rational one adopted, that if one is ignorant of the course of business on the route, he is bound to make inquiry, and cannot make a contract, with his eyes closed, and thereby impose a greater obligation upon the other party, in consequence of his own voluntary want of comprehension.

See also the opinion of the court in *F. & M. Bank v. Ch. T. Co.*, 23 Vt. 211, 212. In *Cooper v. Berry*, 21 Ga. 526, it is said that usage may be resorted to for the purpose of showing that common carriers of certain goods are only subject to a modified responsibility in regard to their preservation, it having been the uniform practice for the carriers to except, in their bills of lading, all losses by fire, and this being known to the owners or their agents.

where the usage or custom is resorted to for the purpose of controlling the general principles and obligations of the law of contract, there is no doubt of the necessity of showing its notoriety, as well as its reasonableness and justice. The latter qualities are generally supposed to be sufficiently shown by the general acquiescence of the public in the usage. But where the complaint against the carrier was for not delivering cotton in good condition, a plea that it was the custom known to the plaintiff to transport cotton and other freight between the points named in the bill of lading, in open boats, and that all the damage which the cotton sustained was caused by the rains which fell during the voyage, was held good on demurrer.²

² *Chevaillier v. Patton*, 10 Texas, 344. Where cotton is shipped through an agent, for that purpose he is authorized to bind his principal according to law. In the absence of proof to the contrary, the general law of common carriers is the power under which the agent acts. If a usage be sufficiently established, that will govern, because it is presumed to be known to the parties. And this presumption is conclusive upon the principal, whether it is known to the agent or not. But a custom known only to the agent, and which is not so established as to change the law of the contract, will not bind the principal.

By way of establishing a usage in shipping upon a particular river, it is competent for a witness to testify as to what has been his habit and custom in shipping on all the boats of said river, as well as on the particular boat upon which the loss occurred, which is the subject-matter of controversy. To make a usage good, it must be known, certain, uniform, reasonable, and not contrary to law. And if boats on a certain river, or a certain boat on that river gave sometimes bills of lading containing an exemption from loss by fire, and at other times bills of lading containing no such exemption, then no such usage is established for want of uniformity. And even if, in a majority of cases, bills of lading contain such clauses of exemption, still the usage is not sufficiently proved to make it the law of the contract between the parties. *Berry v. Cooper et als.*, Ex'rs., 28 Ga. 543.

CHAPTER XX.

CASES WHERE THE CARRIER IS NOT LIABLE FOR GROSS NEGLIGENCE.

§ 223. <i>Extent of English Carriers' Act.</i>	§ 228. <i>But refusal to declare contents will not excuse the carrier for refusal to carry.</i>
§ 224. <i>Must give specification, and pay insurance.</i>	§ 229. <i>This statute does not excuse carrier for delay in the delivery.</i>
§ 225. <i>Loss by felony of servants excepted. But not liable unless by carrier's fault.</i>	§ 230. <i>Disposition in English courts to hold carriers to more strict accountability.</i>
§ 226. <i>Not liable in such case, where the consignor uses disguise in packing.</i>	
§ 227. <i>Carrier is entitled to have an explicit declaration of contents.</i>	

§ 223. UNDER the English Carriers' Act,¹ the carrier is not liable for the carriage of articles there enumerated, as "articles of great value in small compass," with certain specified ones, as "money, bills, notes, jewelry," etc., if the requisitions of the statute are not complied with, although the goods be lost through the gross negligence of the carrier or his servants.² It was said in a recent case, where

¹ 1 Wm. IV. & 11 Geo. IV., c. 68. Looking-glasses being specified in the act, it was held to extend to a "large looking-glass." *Owens v. Burnett*, 2 Car. & Marsh. 357. Some other curious inquiries have arisen under this act, in regard to its extent. Thus the word "trinkets," used in the act, was held not to comprehend an eye-glass with a gold chain attached. *Davey v. Mason*, 1 Car. & Marsh. 45. And also that "silks" does not include silk dresses, made up for wearing. *Ib.* Hat bodies, made partly of wool and partly of fur, are not "furs." *Mayhew v. Nelson*, 6 Car. & P. 58. So, too, a bill of exchange, accepted blank, and sent to the party for whose benefit it was accepted, and who was expected to sign it, as drawer, and which was lost before it reached its destination, is not a bill or note, within the act.

² *Hinton v. Dibbin*, 2 Q. B. 646. Lord Denman, Ch. J., here said: "The question for our decision is, whether, since the passing of the said act, a carrier is liable for the loss of goods, therein specified, by reason of gross negligence. . . . In putting an interpretation upon this statute, for the first time, we neces-

the construction of this act came in question,³ that it is impossible, with precise accuracy, to define what are “trinkets”

sarily feel the case to be one of considerable importance, both because it is the first, and also because it regards a subject upon which much doubt and uncertainty have existed, making it expedient, therefore, that the question should be finally settled. In deciding upon this statute, we must of course be regulated by its language; and the state of the law at the time of its passing is material only so far as it enables us to discover the mischief for which it was intended to apply a remedy. It is then enacted that no such common carrier shall be liable for the loss of or injury to any property therein specified (including silks) above the value of £10, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such carrier, or to his servant, for the purpose of being carried, the value and nature of such property shall have been declared, and such increased charge as thereafter mentioned, or an engagement to pay the same, be accepted by the person receiving such property. By the first section, therefore, thus briefly abstracted, the exemption of the carrier from liability is absolute and complete, unless the preliminary thereby made indispensable is complied with by the owner of the goods. The increased charge is, by the second section, declared to be what the carrier is entitled to receive over and above the ordinary rate of carriage for the conveyance of the species of property before enumerated, when above £10; such increased rate of charge to be notified by some notice to be affixed in some conspicuous part of the office, warehouse, or receiving-house where goods are received for carriage. By section 4, it is provided, that no public notice or declaration shall exempt any carrier from his liability at common law for the loss of or injury to any articles other than those in the first section enumerated, but that, as to such other articles, his liability, as at common law, shall remain notwithstanding such notice. From which exception, as to the liability of the carrier in respect of goods not enumerated, it seems impliedly to follow, that as to those which are, protection is afforded to him in the manner above set forth. By section 8, it is enacted, that nothing in this act shall be deemed to protect such carrier from the felonious acts of any servant in his employ, nor to protect such servant from liability for any loss or injury by his own personal neglect or misconduct. The former branch of the clause is, to say no more, at least consistent with the supposition that for conduct short of felony the carrier is no longer liable; whereas it is obvious that, before the passing of the act, the carrier would have been liable for acts of the servant not amounting or approaching to felony — negligence. The latter branch seems to have been introduced *ex abundanti cautela* merely, seeing that there is nothing in any part of the act to vary the liability of the servant to the master for any misconduct of the former.

“Upon the whole, the language of the first section seems to us to be perfectly clear and unambiguous without exception or restriction, and that none can fairly be implied from any other part of the act. By holding the carrier exempt from liability as to the enumerated articles, unless the owner shall declare their nature, and pay for them in the manner prescribed, we not only further the object

³ *Bernstein v. Baxendale*, 6 C. B. (N. S.) 251.

within the meaning of the act. But as the closest approximation to this, it was said that they must be articles of mere ornament, or if ornament and utility be combined, the former must be the predominant quality. And as instances, it was said bracelets, shirt-pins, rings, brooches, and ornamented shell and tortoise-shell portmonnaies, however small their intrinsic value, are trinkets. So silk watch-guards were held to be silk in a manufactured state; and smelling-bottles and the like, are glass within the act.

§ 224. The act contains an exception of loss caused by the felony of the carrier's servants. The condition upon which, in all other cases, the carrier is to be made liable for carrying the articles enumerated, is, that at the time of the delivery of the articles the owner, or his agent, make a declaration of the nature and value of the goods, and pay or agree to pay, any increased rate of charge which the general regulations of the carrier may require.

§ 225. In regard to the liability of the carrier for loss by the felony of his servants, it was held, that when the carrier was not notified of the contents of the parcels, as, by the act, he was entitled to be, it was only the liability of an ordinary bailee for hire.⁴ And the mere fact of loss, by the felony of a servant, is not *prima facie* evidence of negligence in a bailee for hire.⁵

§ 226. And where the carrier uses artifice to disguise the valuable contents of the parcel, as where two hundred avowed in the title and preamble of the act, but give it the effect of removing doubts and difficulties which (as we have seen) it is admitted did exist as to the liability of a carrier for the loss of goods who has sought to limit that liability by the publication of a notice in the usual form."

⁴ *Butt v. Great Western Railw.*, 11 C. B. 140; s. c., 7 Eng. L. & Eq. 443. In the case of *The Great Western Railw. v. Rimel*, 6 C. B. (N. S.) 917, it is said a carrier is not liable for the felonious act of his servants without gross negligence, but felony in his servants is alone a good answer to a defense by him under the Carriers' Act.

⁵ *Finucane v. Small*, 1 Esp. §15. "To support an action of this nature, positive negligence must be proved," per Lord *Kenyon*, Ch. J. There should be proof of the loss being by the felony of the company's servants, and that it was not committed by others. *Metcalf v. London and Brighton Railw.*, 4 C. B. (N. S.) 307.

sovereigns were enclosed in six pounds of tea, and they were stolen by the carrier's servants, it was held the carrier was not liable, the owner having virtually contributed to his own loss.⁶

§ 227. Under this act the carrier is entitled to have an express declaration from the owner, or his agent, of the contents of a box, whenever it is delivered, however obvious to conjecture the nature of the contents may be.⁷

§ 228. But it seems that the refusal to declare the contents of a parcel, will not justify the carrier in refusing to carry it, but only excuses the loss.⁸

§ 229. In a late case,⁹ it was held, that the exemption of the carrier under this act had reference exclusively to a "loss," of the article "by the carrier," such as by the abstraction by a stranger, or by his own servants, not amounting to a felonious act, or by the carrier or his servants losing them from vehicles in the course of carriage, or by mislaying them, so that it was not known where to find them when they ought to be delivered, and that it does not extend to any loss of any description whatever, occasioned to the owner of the article, by the non-delivery or . . . by the delay of the delivery of it, by the neglect of the carrier or his servants.¹⁰

⁶ *Bradley v. Waterhouse*, *Moody & M.* 154; s. c., 3 C. & P. 318.

⁷ *Boys v. Pink*, 8 C. & P. 361. And in *Baxendale v. Hart*, 6 Exch. 769; s. c., 9 Eng. L. & Eq. 505, in error, reversing the judgment below, the court say: "We think that the act of parliament requires the person who sends the goods to take the first step by giving that information to the carrier which he alone can give, and that if the sender does not take that first step, then he cannot maintain this action by the force of the first section, which expressly says, that the carrier shall not be liable unless the declaration is made. Such declaration, when made, will lead to other consequences; the carrier will know what he is to have more, according to the tariff which he has stuck up in his office; if that sum is paid and the goods are lost, then of course he would be liable; on the other hand, if he refuses to give a receipt as provided by the statute, or has omitted to comply with any provision of that kind on his part to be performed, he would lose the protection given by the act."

⁸ *Pianciani v. London & S. Railw.*, 18 C. B. 226; s. c., 36 Eng. L. & Eq. 418; *Crouch v. London & N.W. Railw.*, 14 C. B. 255; s. c., 25 Eng. L. & Eq. 287.

⁹ *Hearn v. London & S. W. Railw.*, 29 Eng. L. & Eq. 494.

¹⁰ *Ante*, ch. xii., xiii., xiv., and cases cited. The statute now in regard to

§ 230. The last case cited is certainly not a little of a manifestation of a disposition, in the English courts, to

freight generally refers the terms of special contracts to the court, as to their reasonableness.

In *Simons v. The Great Western Railw. Co.*, 18 C. B. 805 ; s. c., 37 Eng. L. & Eq. 286, it was held that the 7th section of the Railway and Traffic Act, 1854, 17 & 18 Vict. c. 31, does not prevent a railway company from making a special contract as to the terms upon which they will carry goods, provided such contract be "just and reasonable," and signed by the party sending the goods.

And it is for the court to say, upon the whole matter brought before them, whether or not the "condition" or "special contract" is just and reasonable.

A condition, that the company will not be accountable for the loss, detention, or damage of any package insufficiently or improperly packed:—Held, unjust and unreasonable. *Semble*, that a condition "that no claim for damage will be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within three days of the time that they should be delivered," is just and reasonable.

A condition, that in the case of goods conveyed at special or mileage rate, the company will not be responsible for any loss or damage, however caused, is just and reasonable.

And in *The London & Northwestern Railw. Co., Appellants, v. Robert Clarke Dunham, Respondent*, 18 C. B. 826, which was a case sent by a county court judge for the opinion of the Court of Common Pleas, it was stated that goods were received by the defendants, a railway company, under the following note, signed by the plaintiff: "Risk note. London & Northwestern Railw. Company, Park Lane Station, Dec. 19, 1855. Hay, straw, furniture, glass, marble, china, castings, and other brittle and hazardous articles, etc., conveyed at the risk of the owners.—Delivered to London and Northwestern Railw. Company, from R. C. Dunham (the plaintiff), 3 crates beef, for F. C. Duckworth, Newgate Market, to be forwarded from Liverpool to London at owner's risk,"—it was held that the court could not, from this statement, judge whether or not the condition was "just and reasonable" within the 17 & 18 Vict., c. 31, § 7.

Jervis, Ch. J., in delivering the opinion of the court, in both cases said: "The result seems to be this, — a general notice is void; but the company may make special contracts with their customers, provided they are just and reasonable, and signed; and whereas the monopoly created by railway companies compels the public to employ them in the conveyance of their goods, the legislature have thought fit to impose the further security, that the court shall see that the condition, or special contract, is 'just and reasonable.'"

"Applying that rule to the case of *Simons v. The Great Western Railw. Co.*, I think the matter is sufficiently brought before the court to enable us to decide it, and that the fourth plea, which states that the goods were received by the company to be carried at a certain special mileage rate, and under and subject to a special contract (referring to the 15th article of the conditions set out in the replication), is a good plea. As to the third plea, I think that is a bad one,

restore, as far as practicable, the reasonable responsibility of carriers, which under the former decisions, with refer-

inasmuch as it seeks to relieve the company from the consequences of the loss or non-delivery of the goods by reason of insufficient or improper package, which, in my judgment, is not reasonable as a ground of relief. I think the court is bound to look at the particular matter in each case, to see whether the condition is just and reasonable or not.

"As to the case of *The Great Western Railw. Company, Appellant, v. Dunham, Respondent*, the same reasons to a certain extent will apply. In order to see whether or not the contract be just or reasonable, it is necessary that we should be furnished with proper materials. The judge of the county court has referred it to us to say whether or not the conditions contained in the 'risk note,' limiting the liability of the company, were unjust and unreasonable, without telling us the circumstances under which the contract was made, or what is the nature or the reason of the particular risk. I therefore think enough is not disclosed to enable us to come to any conclusion as to whether or not the contract or condition is just and reasonable.

"For these reasons I think that in the first case our judgment ought to be for the plaintiff, upon the issue in law raised upon the third plea, and for the defendants as to the fourth plea; and that the second case must go back for the purpose of being more fully stated."

So that now, by this late statute, the law of that country is brought back nearly to its original starting-point. Mere general notices in regard to the liability of carriers are of no avail, unless reduced to the form of special stipulations in regard to the liability of the carrier, and signed by the party sending the goods, and unless, in the opinion of the court before whom the case shall be tried, "just and reasonable."

This act, it is specially provided, shall not affect the Carriers' Act, or any liability under it. But in a late case in the Common Bench it was held, that where the carrier in the bill of lading expressly excepted losses from "leakage and breakage," this exception did not extend to such losses which occurred from his own negligence, but only such as occurred without his fault. *Phillips v. Clark*, 2 C. B. (N. S.) 156.

And where the railway company received cattle for carriage on the express terms, in writing, signed by the owner, that they were to be held free from all risk and responsibility in respect of any loss or damage to cattle, arising in the loading or unloading, from suffocation, or from being trampled upon, bruised, or otherwise injured in transit, from fire, or any other cause whatsoever, it was held to be a reasonable condition within the Railway and Canal Traffic Act, 1854.

And it was said that this protected the company from liability for the loss of cattle by suffocation during the journey, occasioned by the negligence of company's servants. But it was further said, that the facts of this case did not tend to show negligence in the company's servants, the plaintiffs being permitted to send, free of expense, a person who had the oversight of the cattle, and who made no complaint of the sufficiency and safety of the arrangements for transportation. *Alderson, B.*, said, "I think the negligence was really that of the

ence to notices and special contracts, had become uncertain and somewhat problematical.¹⁰

servants of the plaintiff, and that the defendants are not liable on that ground." *Pardington v. South Wales Railw.*, 1 H. & N. 392; s. c., 38 Eng. L. & Eq. 432. In *Betts v. Farmers' Loan & Trust Co.*, 21 Wisc. 80, it was held that common carriers may contract with the owner of live stock that he shall assume all risk of damage, from whatever cause, in the course of transportation.

CHAPTER XXI.

GOODS OF DANGEROUS QUALITY. — INTERNAL DECAY. — BAD PACKAGE. — STOPPAGE IN TRANSITU. — CLAIM BY SUPERIOR RIGHT.

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| § 231. <i>Internal decay. Defective package.</i> | § 239. <i>Carrier liable, if he do not surrender the goods, to one having right to stop in transitu.</i> |
| § 232. <i>Dangerous commodities must be so reported.</i> | |
| § 233. <i>Carrier not responsible for natural decay or leakage.</i> | § 240. <i>Carrier may detain until right is determined.</i> |
| § 234. <i>The owner must bear the loss from dampness of the hold, as one of the accidents of navigation, if excepted from the risk and no fault of the carrier. Carrying salt. Effect of bill of lading, stating goods in good order.</i> | § 241. <i>Right exists as long as the goods are under control of carrier.</i> |
| § 235. <i>Owner responsible for loss from defects in article. Duty of carrier after vessel stranded.</i> | § 242. <i>Most uncertainty exists in regard to capacity of intermediate consignees.</i> |
| § 236. <i>The carrier not responsible except for damages caused by delay, where the owner selects his own carriage and loads it.</i> | § 243. <i>As long as goods are in the hands of mere carriers, right exists, but not when they reach the hands of the consignee's agent for another purpose.</i> |
| § 237. <i>The carrier must do all in his power to arrest incipient losses.</i> | § 244. <i>Company compellable to solve question of claimant's right, at their peril.</i> |
| § 238. <i>Right to stop in transitu.</i> | § 245. <i>Conflicting claims of this kind may be determined, by replevin, or interpleader.</i> |
| | § 246. <i>Or the carrier may deliver the goods to rightful claimant, and defend against bailor.</i> |

§ 231. IN addition to the general exceptions which the law makes to the liability of carriers, of losses from inevitable accident, and the public enemy, there are some others more or less connected with those which it may be proper to mention. Losses from natural causes, such as frost,¹ fermentation,² evaporation,² or natural decay of per-

¹ *Ante*, ch. ii., and note 6.

² Buller's N. P. 69; 3 Kent, Comm. 299, 300, 301; Story on Bailm., § 492 a; Warden v. Greer, 6 Watts, 424; Powell v. Mills, 37 Miss. 691.

It has been considered, that where molasses in a cask of large dimensions was found to have lost, by leakage, through the pressure of the weight of the cask

ishalbe articles,² the carrier exercising all reasonable care to preserve them,² and from the natural and necessary wear upon the bilge of the staves, the cask being admitted to be of sufficient strength for ordinary transportation, but the road being rough at the time by reason of frost, it did not remain firm on account of not being placed upon supports so as to divide the pressure upon the cask more equally, that the carrier was liable for the loss. *Stocker & White v. Sullivan Railw.*, Special Reference; Angell on Carriers, §§ 210, 211, 212. Mr. Walford cites a number of cases, pp. 315, 316, illustrating the subject of this note, from the recent *Nisi Prius* trials.

The company are not liable for an accident arising from the viciousness or want of temper of an animal sent by their railway. *Walker v. London & South-western Railw.* (1843), or from the natural propensity of the animals. *Clarke v. Rochester & Syracuse Railw.*, 4 Kernan, 570. The carrier of cattle is not responsible for injuries resulting from their viciousness of disposition, and the question, what was the cause of the injury, is one of fact for the jury. *Hall & Co. v. Renfro*, 3 Met. (Ky.) 51. But in such cases the carrier is liable for any injury which might be prevented by the utmost foresight, vigilance, and care. *Ib.*; *Conger v. Hudson River Railw.*, 6 Duer, 375. So also from injuries to merchandise from bad package. *Norman v. London & Brighton Railw.* (1843). So also for leakage by reason of bad package. *Lucas v. Birmingham & Gloucester Railw.* (1842). So also where goods are unreasonably exposed to fire for want of proper covering. *Rutley v. Southeastern Railw.* (1845).

And where the owner put several packages, one of flutes, one of watches, etc. into the same bag and sent them by railway, and the flutes were injured, it was left to the jury to say whether the accident was attributable to the carelessness of the company, or whether the plaintiff, by his own improper proceeding, contributed to the disaster, the mode of packing having thrown upon the company a more onerous task than if they had received the articles separately. *Smith v. London & Birmingham Railw.* (1845).

But the consignee of goods well packed is not obliged to accept of a remnant of them in a loose, unpacked state. *Ch. & Rock Is. Railw. v. Warren*, 16 Ill. 502; *ante*, § 158. And in a recent trial at *Nisi Prius*, before Mr. Justice Woodward, of the Pennsylvania Supreme Court, — *Ritz & Pringle v. Penn. Central Railw.*, 10 Am. Railw. Times, No. 14, — where the defendants claimed to excuse themselves from liability for injury to sheep transported on their cars, by reason of too many being put into a car, on the ground that this was done by the agents of the consignor, the agents of the company telling them to exercise their own judgment in regard to the number they would put into each car, the learned judge told the jury that the company could not, in that manner, shift the responsibility which the law imposed upon them. The remarks of the judge in his charge to the jury are marked by a proper regard to the interests of all concerned, and will, we trust, meet with general approval. "In my judgment this is no defense. They were bound to superintend the loading of the sheep. The cars belong to the company, and are, and ought to be, under the exclusive control of the company's agents. They are presumed to know better than freighters and drovers how many tons' weight, or how many animals each car can carry safely, and it is due, alike to the comfort of the dumb beasts, and to the interest of all concerned in the

by careful transportation,² in the mode to which the carrier is accustomed ; or from the defective nature of the vessels or packages in which the things are put, by the owner or consignor, the former class being regarded as the act of

transportation, that the skill and experience of the agents in charge should dictate everything that pertains to the taking or carrying and discharging the load. The less inexperienced persons have to do with these matters the better, and to turn such duties over to them is negligence on the part of the company's agents. They have storehouses in which to receive and load goods, and the shipping merchant is never expected or permitted to direct how many cars shall be employed in the transportation of his wares, nor what quantity shall go in each car. In like manner, the company is provided with cattle-yards and pens into which they receive live stock, and their duties as common carriers attach from the moment they take possession of the stock. They may call on the owner or his servants to assist in loading the live stock, nay, they may require them to do all the manual labor, as best acquainted with the disposition and habits of the beasts, but it must be done under the practiced eye of the company's agent, whose duty it is to see that the car is roadworthy, and that it is properly loaded. He may no more resign this duty to the drover than to the freighting merchant, and may no more neglect this duty than any other connected with the transportation. If, therefore, the jury believe that Boyle stood by and permitted the cars to be overloaded, whereby the sheep were injured, the company is liable for the consequences of his negligence."

The same principle is reaffirmed in *Powell v. Penn. Railw. Co.*, 7 Law Reg. 348; s. c., 32 Penn. St. 414, by the same learned judge. It was here decided that where the agents, or servants of a common carrier, having charge of that portion of the business, suffer the shipper of live stock to put straw into a car, although under protest that if he do so it must be at his own risk, and the straw is fired and damage done to the animals, being horses in this instance, this constitutes negligence in the carrier, and he is liable to respond in damages, notwithstanding the shipper signed a release from all claim to damages to such stock while in the company's cars. And where in such case the court are requested to charge the jury, that if there was liability to fire from the locomotive communicating with the straw, and the fire was so communicated, and the damage ensued in consequence, it is negligence, and the company is liable, it is error to refuse compliance with the request. *Woodward, J.*

But where the owners of freight hire cars, load them as they choose, and are told that they load at their own risk, the company is not responsible for damages occasioned by injudicious loading, or for any loss resulting from the inherent defects of the article causing its destruction, or for decrease in the weight of live stock, arising from the mode of transportation, but are liable if any loss be caused or increased by their own want of care and watchfulness. *Ohio & Mis. Railw. v. Dunbar*, 20 Ill. 623.

And a carrier is not responsible for leakage arising from an imperfection in the bung of a cask entrusted to him to be carried, and not caused or increased by any negligence on his part. *Hudson v. Baxendale*, 2 H. & N. 575.

God, and the latter the fault of the party, will excuse the carrier. Where the bill of lading contained in the margin the words "not accountable for leakage or breakage," the goods being casks of wine, it was held not to exempt the carrier from the ordinary condition of due care in the stowage of the casks. The different degrees of negligence are here thus defined: "Gross negligence is used to describe the sort of negligence for which a gratuitous bailee is liable; but it is not properly applicable to an unskilled person who does not use skill, but only where a skillful person does not use the skill he has." The subject of the proper distinction between the different degrees of negligence is here discussed and the cases commented upon much at length.³

§ 232. Questions of some difficulty often arise in regard to the dangerous quality of the articles delivered to carriers for transportation, and the consequent duty of the owner of the goods. It would seem to be reasonable in such cases, and such seems to be the course of decisions, that the owner shall inform the carrier of the character of the goods, whenever that is essential to be known, either on account of carrying the particular goods safely, or of carrying them in such a manner that other goods may not be damaged by coming in contact with them, and that for any default in this particular the owner is respon-

³ *Phillips v. Clark*, 5 C. B. (N. S.) 882. See also *Briggs v. Taylor*, 28 Vt. 180. And where one delivers goods of a dangerous character, such as oil of vitriol, to a carrier without disclosing its dangerous quality, he will not be liable to a statutory penalty, unless himself aware of the contents, but he may nevertheless be responsible to the company for all damage in consequence in a civil action, since one who delivers such a parcel must be presumed to be aware of its contents so far as civil responsibility for consequences is concerned. *Harne v. Garton*, 5 Jur. (N. S.) 648; s. c., 2 El. & Bl. 66. So also where one allowed a servant of the carrier to take a carboy of oil of vitriol from his cart without making him understand the dangerous qualities of the article, only saying it contained acid, and the servant was seriously injured by the bursting of the carboy while carrying it upon his back, the owner was held liable to the servant in an action for the damages sustained. *Farrant v. Barnes*, 11 C. B. (N. S.) 553; 8 Jur. (N. S.) 868.

sible, not only to the extent of any damage accruing to the goods, but even beyond that.⁴

§ 233. And the carrier is not responsible for the decay of perishable articles, without his fault, even where he is driven by stress of weather, out of the direct course, into a strange port for repairs, whereby the injury is caused, or increased.⁵ Nor is he responsible for leakage through the nature of the article or the defect of the casks, without fault on his part. The owner of articles subject to such contingencies, in hot weather and warm climates, as lard for instance, assumes all such risks as necessarily, or ordinarily, attend similar shipments, where they occur without the fault of the carrier.⁶

§ 234. And damage done to cotton thread by reason of the dampness of the hold, not occasioned by any fault of the carrier, is an accident of navigation within that exception in the bill of lading, and the shipper must bear the loss resulting from such accidents, unless he can show that the negligence of the master, or mariners, made it operative on his goods.⁷ As the taking of salt as part of the cargo of a general ship is common and allowable, the owners of other goods, liable to be injured thereby, must bear the resulting loss, if there was no bad stowage and no inquiry made by the shipper in regard to it.⁷ The declaration in the bill of lading, that the goods are "shipped in good order, contents unknown," is only *prima facie* evidence of the goods being in such condition, at the time, as it must of necessity have reference only to the external appearance of the packages. And where proof is given tending to show such was not the fact, it casts the burden upon the owner, to prove the actual condition of the goods when shipped.⁷

§ 235. The shipper is responsible for all losses resulting

⁴ *Hutchinson v. Guion*, 5 C. B. (N. S.) 149; *supra*, n. 3.

⁵ *The Brig Collenberg*, 1 Black (U. S.) 170.

⁶ *Nelson v. Woodruff*, 1 Black (U. S.) 156.

⁷ *Clark v. Barnwell*, 12 How. (U. S.) 272.

from the articles being in bad condition when shipped and perishing during the voyage without the fault of the carrier.⁸ This was the case of a cargo of potatoes. The question of the responsibility of carriers by water is very carefully and learnedly examined by Mr. Justice *Clifford*, in *The Propeller Niagara v. Cordes*,⁹ and the duty of the master to do all in his power to protect the goods on board, after the stranding of his vessel, very clearly stated.

§ 236. It is the general duty of carriers to furnish safe and suitable carriages for the transportation, and to see that the articles are properly stowed therein. But where the owner makes his own selection of the carriage, knowing of the defects therein, and the carrier is bound to see that he does know thereof;¹⁰ or where the shipper selects his own carriages and charters and loads them himself,¹¹ the carrier is not responsible for injuries resulting from defects in the carriages or loading. But in the former case, he is responsible for increased damage resulting from delay on the passage, beyond the ordinary time, and from not having the cattle on board properly watered. And the owner of the cattle, in order to preserve his right of action against the carrier, is not bound to insist upon the cars proceeding, when ordered to wait for another train, or to insist upon attempting to water the cattle when told that the train might start before that could be done. He is justified in conforming to the directions of the conductor, and it is the duty of the latter to see that cattle on board are properly cared for.

§ 237. It is the duty of a carrier to make all reasonable exertions to save an incipient damage to goods becoming more serious than is absolutely necessary, although he may not have been in fault on account of, or responsible

⁸ *Ship Howard v. Wissman*, 18 How. (U. S.) 231.

⁹ 21 How. (U. S.) 7.

¹⁰ *Harris v. Northern Indiana Railw.*, 20 N. Y. 232.

¹¹ *East Tennessee, etc., Railw. v. Whittle*, 27 Ga. 535.

for, its occurrence.¹² It is no excuse for the carrier, that, where the goods were injured by rain, in their passage to the defendant's wagon and office, they were not secured in cases or water-proof coverings.¹³

§ 238. In regard to stoppage *in transitu*, it is a subject which in its general bearing does not properly come within the range of this work, but as it incidentally affects the rights of common carriers, in all modes, it may be useful to give here its general definition, and briefly point out the mode in which carriers are liable to be affected by the exercise of the right. Stoppage *in transitu* is the right which resides in the vendor of goods upon credit, to recall them upon discovering the insolvency of the vendee, before the goods have reached him, or any third party has acquired *bonâ fide* rights in them.¹⁴ The carrier's interest in this question arises only when he is required by the vendor, while the goods are still in his possession, to redeliver them to him or some one on his account.

§ 239. After such demand it becomes important to the carrier to determine whether the right to reclaim the goods still exists. For if so, and the carrier decline to redeliver them, or deliver them to the vendee, he and all persons claiming to retain them against the claim of the vendor, become liable in trover for their value.¹⁵

¹² Chouteauk v. Leech, 18 Penn. St. 224; Blooker v. Whittenberg, 12 La. Ann. 410.

¹³ Klauber v. American Express Co., 21 Wisc. 21.

¹⁴ 2 Kent, Comm. 540, *et seq.*; Lickbarrow v. Mason, 1 Henry Black. 357; s. c., 6 East, 21; s. c., 2 T. R. 63; 1 Smith, L. C. 388 and notes, where the whole law upon the subject, both English and American, will be found. The right to stop goods *in transitu* is nothing more than the extension of the lien which the vendor has on all sales, for the price, until after delivery, to the very point of the goods coming to the actual custody of the vendee, or his agent. Shaw, Ch. J., in Rowley v. Bigelow, 12 Pick. 313.

This leading case establishes the point, that the vendee may defeat the right of the vendor to stop the goods *in transitu*, by a *bonâ fide* assignment of the bill of lading for value. And we are not aware that the right can be defeated in any other mode, until the goods come to the virtual possession of the vendee.

¹⁵ Litt v. Cowley, 7 Taunt. 169; Bohrtlingk v. Inglis, 3 East, 381; Syeds v. Hay, 4 T. R. 260.

§ 240. The principal difficulty which arises in such cases, so far as the carrier is concerned, will be likely to occur in regard to goods which have passed through one or more carrier's hands, before they come into those of the one upon whom the demand for the goods is made. For in the case of a single carrier, he may safely conclude that if such a demand is made upon him while the goods are in his custody, it will be prudent to retain them until the existence of the asserted right is established, and if so, to surrender them in obedience to the demand, as there can be no question of the right of the unpaid vendor ordinarily, to reclaim the goods in case of the insolvency of the vendee, as long as they remain in the possession of the carrier.¹⁶

§ 241. It is not enough to defeat this right, that the transportation is accomplished, if the goods still remain under the care and control of the carrier, as in the case of a railway, in the warehouse of the company, awaiting the arrival of the vendee; or in the warehouse of a wharfinger, or warehouseman;¹⁷ unless, as is said in some of the

¹⁶ See the cases cited under note 4. And it would not be regarded as a conversion in the carrier to retain the goods, after a demand from the vendor, for a sufficient time, to enable him to ascertain whether the right to stop *in transitu* ever existed, and if so, whether any intervening rights had accrued either by act of the vendor or the vendee, which would defeat it.

¹⁷ *Dodson v. Wentworth*, 4 Man. & Gr. 1080, where Ch. J. *Tindal* thus states the distinction between the cases where the transitus is ended, by depositing in the warehouse of the carrier, or other person, and those where this does not have that effect.

"The warehouse, in which the goods were lodged was not the warehouse of the carrier; as some of the cases turn upon the point that the transitus is not at an end while the goods remain in the possession of the carrier, not only in the actual course of the journey, but even while they are in a place of deposit, connected with transmission. But the place of deposit here is the warehouse of a third party," and the question is whether the depositary acts "as the agent of the carrier, or the consignee."

In a late case, *Harris v. Hart*, 6 Duer, 606, this subject is discussed with great ability by a court of large experience in regard to commercial law, and an attempt is made to rescue the principle upon which all the cases profess to go from something of that confusion into which some of the modern, and especially the American cases, have thrown it. The principle upon which the whole subject rests, is, that of giving the vendor a lien for the price of the goods, until they

cases, the vendee, by special contract and understanding, is accustomed to use the warehouse of the carrier or wharf-

come into the actual possession of the vendee, or of his agent, for custody, and not for transportation. With this view all reasonable construction should be in favor of maintaining the lien. Hence in this last case it was justly held, that while the goods were in the course of transportation, even by the vendee's agent on board his own or a hired vehicle, the right to stop *in transitu* still existed.

And in the case of *Sheridan v. The New Quay Company*, 4 C. B. (N. S.) 618, where goods were sold to a party at Manchester to be forwarded to Liverpool for delivery, and were accordingly sent to L. and put into the hands of defendants, who were wharfingers and carriers at L., to be carried to Manchester for the vendee, it was held the vendor's right of stoppage *in transitu* was not gone. s. c., 5 Jur. (N. S.) 248.

And in the very recent case of *Schotsman v. The Lanc. & Yorksh. Railw. Co.*, Law Rep. 1 Eq. 349; s. c., 12 Jur. (N. S.) 42 (1866), this precise point is very carefully considered by Lord Romilly, M. R., and the following propositions declared. The right of stoppage *in transitu* is not lost because the vessel on which the goods are shipped is the property of the vendee, if the vessel is a general ship, and is employed as a mere common carrier. It would seem to be otherwise if the vessel were sent by the vendee expressly to fetch these particular goods, or if any agent were on board expressly authorized to receive them; or if the bills of lading were delivered to the captain, or sent to the vendee.

It will be useful to state this case and the opinion of the court more at large, as the latest exposition of the English law upon the point.

"This was a question whether the right of stoppage *in transitu* existed under the following circumstances: In the month of July, 1864, the plaintiff, Emile Schotsman, a merchant at Lille, entered into a contract to sell to the defendant Cunliffe, who carried on business as Messrs. Fort & Co., of Goole, 1870 sacks of wheat flour, and accordingly directed Messrs. Delafosse Brothers, of Rouen, as his agents and on his behalf, to purchase and ship the same. The said Messrs. Delafosse accordingly, as the agents of the plaintiff, Emile Schotsman, shortly before the 28th of September, 1864, shipped 1870 sacks of wheat flour on board a screw steamer called *The Londres*, which was then bound from Rouen to Goole, and of which Thomas Woodhead was the master. This vessel belonged to Messrs. Watson, Cunliffe, & Co., which firm consisted of the defendant Cunliffe and of one other person. She was a general ship, trading and making regular passages between Rouen and Goole. The master of the ship, on the same 28th September, signed four bills of lading of the flour, one of which he retained himself, while he gave the other three to Messrs. Delafosse.

On the 30th September, Messrs. Delafosse having reason to doubt the solvency of Messrs. Fort & Co., endorsed one of the bills of lading, "Don't deliver to Messrs. J. Fort & Co., but only to Emile Schotsman, or to his order. Rouen, Sept. 30, 1864. (Signed) Frères Delafosse." The bill of lading, thus endorsed, was sent by them to the plaintiff Schotsman, who endorsed it over and forwarded it to the other plaintiff, Craig, who was his agent in England.

On the 3d of October, 1864, a bill of exchange, in the hands of the plaintiff,

inger as his own. In such case it is the same, when the goods are deposited in the warehouse of the carrier, or Emile Schotsman, which was drawn by Schotsman, senr., of Douay, upon, and was accepted by, the said Messrs. James Fort & Co., for the sum of £1000, fell due, and was duly presented for payment, but was dishonored, and had since been protested for non-payment.

On the same 3d October, 1864, the vessel arrived in the river Humber, under the same Thomas Woodhead as her master, and with wheat flour on board. Craig, acting as the duly appointed attorney of Schotsman, immediately gave notice to Woodhead, the master, and to Cunliffe, of the stoppage *in transitu*, but was unable to prevent the flour being delivered to the defendants; the Lancashire & Yorkshire Railw. Co., who are the owners of extensive warehouses at Goole, and who, although notice was given them of the rights and claims of Schotsman, declared their intention of holding the same for Fort & Co., and had delivered part of the goods to them, or their order.

On the 11th October, 1864, the defendant Cunliffe, as James Fort & Co., was adjudicated bankrupt; and the defendant Banner had since been appointed creditor's assignee. The bill was accordingly filed against the Lancashire & Yorkshire Railw. Co., Cunliffe and Banner, to enforce the stoppage *in transitu*, and the suit now came on to be heard.

Baggallay, Q. C., Eddis, and Butt (of common-law bar) for the plaintiff, contended, that as the ship was a general ship the stoppage *in transitu* was good, notwithstanding that the ship was the property of the defendant, who was himself the consignee of the goods. [They cited *Mitchell v. Eade*, 11 Ad. & El. 888; *Van Castul v. Booker*, 2 Exch. 691; *Turner v. The Liverpool Docks Co.*, 6 Exch. 543; 1 Smith's L. C. 643 4th ed. (notes to *Lickbarrow v. Mason*); and *Heinekey v. Earle*, 8 El. & Bl. 410.]

Jessel, Q. C., and Lawrence Bird, for the Railw. Company, contended that the right to stop *in transitu* was gone, the goods having previously got into the possession of the consignee, as owner of the ship. As the company had parted with the goods, no injunction could be granted in this case, and the Chancery Amendment Act, 21 & 22 Vict. c. 27, § 3, giving power to the court to award damages, did not apply, and consequently the court had no jurisdiction. [They referred to Chit. Contr. 390, 393, 7th ed.; The Mercantile Shipping Act, 1854, § 70; the 18 & 19 Vict. c. 111, § 3; *Ogle v. Atkinson*, 5 Taunt. 759; and *Fowler v. MacTagart*, cited by *Lawrence, J.*, in *Bohtlinck v. Inglis*, 3 East, 396.]

Selwyn, Q. C., and Lindley, for the assignees in bankruptcy, cited *Fragano v. Long*, 4 B. & Cr. 219; 2 Selw. N. P. 1288, 1292; *London & Northwestern Railw. Co. v. Bartlett*, 7 H. & Norm. 400; *Bohtlingk v. Inglis*, 3 East, 381; *Bolin v. Huffnagel*, 1 Rawle's Amer. Rep. 1; *Lucas v. Nockells*, 2 J. & J. 304; and *Whitehead v. Anderson*, 9 M. & W. 518.

Sir J. Romilly, M. R., without calling for a reply, said: The general view of the case I take is this, — I think the principle of these cases is not much in dispute, but the difficulty generally arises on a question of fact. I apprehend it will not be disputed on either side that in every case where there is a contract for the sale of goods between a vendor and a vendee, the property in the goods passes to the vendee as soon as the goods are delivered for his benefit to any common

warehouseman, or wharfinger, as if they had reached the warehouse of the vendee himself.¹⁸

carrier, subject to the right of stoppage *in transitu*, before the actual or virtual delivery into possession of the goods takes place. The only question really is, whether that is so here or not; and the real question depends on this, whether there was an actual or virtual delivery of the goods when they were put on board the ship at Rouen; because, if there were, the stoppage *in transitu* was at an end; if there were not, there was a stoppage *in transitu* by the co-plaintiffs on the morning before they were delivered. It appears to me that a proposition has been stated on behalf of the defendant, which will not be disputed by any body, that if the vendee of the goods sends his own ship for the goods, and they are delivered on board that ship, that is an actual delivery of the goods to the vendee, and there the matter ends; the stoppage *in transitu* is over, and nothing more can be said on the point. That I consider to be practically the decision in the case of *Ogle v. Atkinson, supra*. There may also be an actual delivery, although the ship is not the ship of the vendee. For instance, if the purchaser of the goods sends over an agent on his behalf to receive the goods for him, and they are delivered to him in the character of agent for the purchaser, then there is an actual delivery of the goods, and the stoppage *in transitu* is at an end. Now a very material matter in this case consists in this, — whether there is, in the absence of anything being stated, an actual delivery to the owner of the ship, if the ship is a general ship for a general cargo? In the case of *Ogle v. Atkinson* (I think that was the case in which a quantity of hemp was despatched from Riga), the purchaser of the goods expressly sent his own ship for those goods, and that is so found in the special case, and the captain was sent as agent of the purchaser to receive the goods. The court in that case held, that as soon as the goods were put on board

¹⁸ *Rowe v. Pickford*, 8 Taunt. 83. This is the case of a trader in London who was in the habit of purchasing goods in Manchester and exporting them to the Continent soon after their arrival in London, and the goods in the mean time remained in the wagon-office of the carriers. It was held that the right of stoppage *in transitu* ceased upon the arrival of the goods at the wagon-office. See also *James v. Griffin*, 1 M. & W. 20; *Edwards v. Brewer*, 2 id. 375. It is never deemed important, in order to defeat the right to stop *in transitu*, that the goods should have come to the very hands of the consignees. It is enough if they have come to the hands of some one acting for him. *Ellis v. Hunt*, 3 T. R. 464. If the consignee generally makes use of the wharfinger's warehouse as a place to keep his goods in, the transitus is at an end, when the goods are deposited there. *Tucker v. Humphrey*, 4 Bing. 516; *Richardson v. Goss*, 3 Bos. & P. 119; *Foster v. Frampton*, 9 D. & R. 108; s. c., 6 B. & C. 107.

Wentworth v. Outhwaite, 10 M. & W. 436. This is the case where the goods were kept by the carrier as warehouseman at the end of the public carrier's route, until they could be sent for by the vendee, at his own convenience, and upon payment of warehousing. It was held the transitus terminated upon the arrival of the goods at the warehouse. This case is put by *Abinger*, Ch. B., with whom the court concur, upon the ground that the warehouseman was an agent of the vendee for receiving the goods and keeping them, *not for forwarding*,

§ 242. But by far the most difficult questions arise under this head in a class of cases, quite numerous, where that ship, they were actually delivered to him as his particular agent. It is true that he afterwards took in other goods, but the ship was sent expressly for the purpose of receiving those goods, and consequently it was analogous to the case which Mr. Bird put to me of the carrier being the purchaser of the goods, and sending one of his ordinary carrier-wagons to receive them, in which case no one could doubt the delivery would be perfect, and the stoppage *in transitu* would be at an end. But if the ship is a general ship, then, I apprehend, the case of *Mitchell v. Eade*, *supra*, determines that the ship stands expressly in the same situation as the common carrier. That is the important part of the decision in *Mitchell v. Eade*, and the mere fact that the ship which is used as a common carrier is the property of the vendee, does not make the mere placing of the goods on board a delivery to the owner of the ship. That, in my opinion, is what is determined in *Mitchell v. Eade*, and that is the important part of the decision with reference to the case at present before me. I admit, indeed, — and that, as I stated to Mr. Selwyn, is a very material part of his case, — that although there may be no actual delivery, yet there may be a virtual delivery, which would amount to the same thing. If the bills of lading had been sent to Fort & Co. (to Mr. Cunliffe), then, I apprehend, the stoppage *in transitu* would have been at an end as soon as he got the bills of lading.

In this case what occurred was this: When the goods were put on board the vessel, the captain signed four bills of lading, and he delivered three of them to Messrs. Delafosse & Co., as the shippers, and he retained one himself. I think those are the exact words which are stated in the bill and in the answer. That is very material, because if Messrs. Delafosse & Co. had delivered all the bills of

which showed the transitus at an end. Baron *Parke* also said: "The carriers held them, not as agents for forwarding them, but for their safe custody, and they were constructively in the possession of the vendee." *Dodson v. Wentworth*, 4 M. & Gr. 1080, is a similar case, and decided upon the same ground. *Dixon v. Baldwin*, 5 East, 175. In *Heinekey v. Earle*, 8 El. & Bl. 410, goods were shipped by order to A, and the bill of lading made them deliverable to A on paying freight; but on their arrival, A, being embarrassed, and not wishing to accept the goods, if he stopped business, objected to receive them, but they were afterwards landed and locked up in his warehouse, A intending to warehouse them for the vendor, if he could so do. The vendor demanded the goods, and A declined surrendering them, on the ground that his solicitor advised him he could not do so safely. The goods were subsequently assigned for the benefit of creditors; it was held that the transit was at an end.

Lord *Campbell*, Ch. J., said: "A mere delivery at the place of destination is not necessarily a termination of the transit. The transit remains until the goods have come into the possession of the consignee, and although they are landed at the place to which they are destined, unless the consignee has taken possession of them, I think they are still in transit. The merely putting upon the premises of the consignee, I think, could not necessarily be a termination of the transit." But in this case it was held, the consignee's consent to retain them determined the transit.

the goods are directed by a particular route, through successive lines of carriers, and at the intermediate points to

lading to the captain, that would have put an end to the stoppage *in transitu*, and made a virtual delivery of the goods to Cunliffe, or the agent of Cunliffe. I am of opinion that the mere retention by the captain of that bill of lading cannot be treated in the same way, unless it was so retained by him under an express arrangement between them that it should be treated exactly as if he had delivered it. I think there is an analogy between the case of *Mitchell v. Eade* and the present case, though it is open to the distinction which Mr. Selwyn and Mr. Lindley have pointed out, and which Mr. Jessel enlarged upon very much, that it was not a case of vendor and purchaser. In that case the captain had signed the bill of lading and had delivered it to the shipper. But suppose the captain had afterwards made another bill of lading and signed it and kept it in his own possession, which he could have done the next day, would that have made any difference in the decision? It is clear that, according to the opinion of Sir J. Campbell, who argued that case, if the bill of lading had been delivered by the shipper to the captain, in that case, then, the ownership of the goods would have passed, or, to apply it to a case like the present, the stoppage *in transitu* would have passed. But it is impossible to say that the captain, who might have made the bill of lading the next day if he thought fit to do it, without the sanction of the shipper, could by that means have created the transfer of the property which the shippers did not intend to take place. So also in this case I am of opinion, that if the captain had thought fit to make a bill of lading and sign it himself immediately after the delivery of the three bills of lading to the shipper, that would not have taken away the right of stoppage *in transitu* from the shipper, not having been done with his sanction, and not being done with the intention of an actual delivery of the goods.

This is the general view I take of the case. It is very important to observe, and it should always be borne in mind, that there is a distinction between Mr. Cunliffe, or Messrs. James Fort & Co. (whichever name you please to call him by) and Messrs. Watson, Cunliffe, & Co. They are two distinct sets of persons. It is very true that Mr. Cunliffe was (if I may use a species of anomalous expression) the sole partner in one firm, and that he was partner with another person in the other firm. But they are totally separate and distinct characters; and in courts of law we have constantly to deal with that circumstance. One man frequently unites in his own person different characters. He may be a consignee and an executor, but what he does as an executor does not affect what he does as consignee. This vessel was a vessel that duly advertised as a trading vessel between Goole and Rouen by Messrs. Watson, Cunliffe, & Co., for the common carriage of goods, and, therefore, it appears to me that this was not a vessel sent by Cunliffe for the reception of those goods, but that it was a mere common carrier. The expression in Cunliffe's answer, which I marked last night, is this. It is at the end of paragraph 5 of the answer. "I admit that Messrs. Delafosse did thereupon, and, in fact (but whether or not as the agents of and on behalf of the plaintiff, Emile Schotsman, I cannot set forth as to my belief or otherwise), on or about the 28th September, 1864, ship 1870 sacks of wheat flour on board a screw steamer called The Londres, and that the said Londres was then bound from Rouen

the care of particular persons, who may be wharfingers, forwarding merchants, warehousemen, carriers, or combin-

to Goole, and that she was trading, and advertised to be trading, between those ports, and that she brought over from Rouen to Goole a general cargo, and that Messrs. Watson, Cunliffe, & Co. were the agents and consignees of the said ship, and that Thomas Woodhead was the master thereof."

Now I admit that if Cunliffe, hearing that this flour had been purchased for him, had sent this ship expressly for the purpose of taking that flour, and had sent the captain for the purpose of receiving the flour, and had so informed Messrs. Delafosse & Co., though he had taken in other goods and another cargo, then it would have come within the case of *Ogle v. Atkinson* (*supra*); and there would have been an actual delivery the moment they were put on board the vessel. But the vessel being of that description, then I am of opinion that unless they were intended to be delivered to some express agent of the purchaser, there was no delivery by putting them on board the ship. Putting them on board the ship is nothing more than this, that it is necessarily putting them within the control of the captain of the ship; and the fact that the captain of the ship is appointed by the owner of the ship does not make him a bit more the agent for the receipt of these goods than if any other person had appointed him. It is all involved in the question whether the ship was a ship trading generally, or was specially sent for the express purpose of receiving these goods. If not, the delivery of them on board the ship is only delivering them to the captain, who has the control of the ship, and he is only agent for the owner for the general purposes of the ship, and not for the express purpose of receiving these goods, unless he has been expressly deputed as his agent for that purpose.

I have admitted that if the bills of lading were delivered to him as the agent of the vendee for the purpose of transferring the property, there would be a virtual delivery, and that would put an end to the stoppage *in transitu*. But although I confess the evidence is meagre on that subject, I think it does not amount to that. The evidence which is stated is this, and there is nothing more on the subject. The master, on the 28th September, signed four bills of lading of the flour, one of which he retained and the other three of which he handed back to the said Messrs. Delafosse. I find no other evidence on the subject.

Now, Mr. Jessel, in pointing to the extremely meagre character of the evidence on this point, wanted to bring me to this conclusion, that I must presume every thing that is not proved against the plaintiff; but I am not of that opinion. If the defendants rely on the delivery of the bill of lading to the captain, it is for them to prove it. The presumption appears to me to be, that the ship was a general ship, and that the putting of the flour on board was not by itself a delivery. If it is contended that the delivery of the bill of lading amounts to a virtual delivery, this is altogether a separate matter, which must be duly proved.

There seems to be no question of the right of the unpaid vendor to stop the goods in the course of the transit, even after they come into the hands or control of a particular person named by the vendee as his agent for the purpose of receiving and forwarding the goods. *Carfan v. Campbell*, 6 Am. Law Reg. 561, citing *Covill v. Hitchcock*, 23 Wend. 611. But where the bill of lading is *bonâ fide* obtained from those having the general authority to negotiate it, and value paid

ing two or more of these capacities. But where one had employed an agent at an intermediate stage in the transit to forward all goods coming to that port for him, it was held not to terminate the transitus when the goods reached the hands of such agent and were by him forwarded by another ship.¹⁹ A usage for carriers to detain goods on a lien for the general balance of account between them and the consignees, will not affect the right to stop *in transitu*.²⁰

§ 243. The principle by which the question of the continuance of the transitus is determined in this class of cases, is the same already stated. If the person to whose custody the goods are consigned, at an intermediate point, is only to be regarded as an agent, for forwarding, or keeping, or carrying, in the course of the transportation, then the transitus is not ended. But upon the other hand, if such person, although a carrier, or connected with the carrying business, is to keep the goods for the consignee, and, as his agent, or in that capacity, to give them a new destination, or so to keep them until the consignor can send for them, or dispose of them, or give them a new destination, in all these cases the transitus is ended.²¹

§ 244. Railway companies, from the manner of transacting their business, would not be likely to be exposed to the raising of such questions very often, while the goods were in their custody. But as many of the long lines of transportation consist of numerous independent routes, and often in different countries, states, or kingdoms, such questions very frequently arise upon prior portions of the line,

in faith of it, the right to stop *in transitu* is gone, although the party negotiating it be guilty of fraud as to another party to whom it had been contracted and value paid. *Pease v. Gloahee*, Law Rep. 1 P. C. 219; s. c., 12 Jur. (N. S.) 677.

¹⁹ *Nichols v. Le Feuvre*, 2 Bing. N. C. 81; s. c., 2 Scott, 146.

²⁰ *Openheim v. Russell*, 3. B. & P. 42.

²¹ Cases cited under note 8. See also *Covell v. Hitchcock*, 23 Wend. 611. And where it is the practice of a carrier, at a particular place, to deposit goods upon a public wharf, and for the consignees to come and take them away at their pleasure, no one having any further charge of them, it was held, that the transitus ended upon the goods reaching the wharf. *Sawyer v. Joslyn*, 20 Vt. 172.

which they are by the rules of law compellable to solve, at their peril, upon an admonition by telegraph, from an unknown party, a thousand miles distant, which renders it of consequence that they should be able to obtain competent counsel upon questions of this character.²² It is the same, in regard to all goods put into the custody of a carrier by a subordinate party, if demanded by the party having superior right, the carrier must surrender them to him, or he is liable in trover if the goods still remain in his possession, otherwise if he have finished his office in regard to them.²³ It seems to be settled, that the right to stop goods *in transitu* is divested, by the *bonâ fide* purchase of the assignment of the bill of lading, without notice of fraud in any intermediate assignee, although, as between some of the former parties there may have existed such an extent of bad faith as to vitiate the assignment or transfer of the bill of lading as between these particular parties.²⁴ So an order for the delivery of the goods, after their arrival in port, given to one who had paid the freight, and held the assignment of the bill of lading, no delivery being made before notice to stop the goods in transitu, will not defeat the right of the vendor.²⁵

§ 245. There seems to be some confusion in the cases in regard to the right of a third party to interpose his claim between the bailor and bailee. It is perfectly well settled that the bailee cannot defend against the claim of the bailor, by showing a better outstanding title to the thing, in a third party, who has made no claim upon him.²⁶ But

²² Guilford, Clark, & others v. Smith, Eldridge, & Lee, Trustees of the Vermont Central Railw., a case involving these questions, 30 Vt. 49.

²³ Ogle v. Atkinson, 5 Taunt. 759; Wilson v. Anderton, 1 B. & Ad. 450. It is a good defense to the carrier, that he has surrendered the goods according to the order of the bailor before he receive counter orders from the superior owner, and until that the carrier cannot dispute the title of his bailor. Story on Bailm. § 582.

²⁴ The Argentina, Law Rep. 1 Adm. 370; Pease v. Gloabee, Law Rep. 1 P. C. 219.

²⁵ Coventry v. Gladstone, Law Rep. 6 Eq. 44.

²⁶ Gosling v. Birnie, 7 Bing. 339; Holl v. Griffin, 10 Bing. 246.

it is settled, that the bailee may defend against the claim of the bailor, by showing the goods have been taken from him by legal process.²⁷ Hence in cases of this kind the more common course is for the interposing claimant to resort to the writ of replevin; and sometimes to a writ of interpleader, in order to settle the rights of the contending parties, if no other adequate remedy exists.

§ 246. But we apprehend there is no necessity for any such resort. Wherever the bailor obtains possession of the goods by force or fraud, or attempts to retain possession of them through the carrier, after his title has expired, in analogy to the case of landlord and tenant, the bailee may, upon having notice to surrender the goods to the rightful owner, under penalty of a suit, yield to the claim of the rightful proprietor, and defend against that of the fraudulent or wrongful bailor.²⁸ And, as is said before, the rule seems now to be settled, that in such case the carrier must deliver the goods to the rightful owner at his peril.²⁹

²⁷ *Burton v. Wilkinson*, 18 Vt. 186. If this defense were not valid, it might compel the party to resist the acts of a public officer in the discharge of his duty, which the law will never do.

²⁸ *Post*, ch. xxiii.; *Swift v. Dean*, 11 Vt. 323; *Turner v. Goodrich*, 26 Vt. 707. The carrier, where goods are shipped in the name of one not the owner, may prove in excuse for not delivering them to the shipper or his assigns, that they were taken from him by lawful process against the rightful owner, against his will. *Van Winkle v. U. S. M. S. Co.*, 37 Barb. 122; *Bates v. Stanton*, 1 Duer, 79.

²⁹ Story on *Bailm.* § 450. *Littledale, J.*, in *Wilson v. Anderton*, 1 B. & Ad. 458. "He may show that the title of the lessor has been put an end to; and therefore in an action of covenant by the lessor, a plea of eviction by title paramount, or that which is equivalent to it, is a good plea, and a threat to distrain, or bring an ejectment, by a person having good title, would be equivalent to an actual eviction."

CHAPTER XXII.

EFFECT OF BILL OF LADING UPON CARRIER.

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| <p>§ 247. <i>Between consignor and carrier the bill of lading is primâ facie evidence.</i></p> <p>§ 248. <i>But questions of quantity and quality of goods cannot be raised where intermediate carriers are concerned.</i></p> <p>§ 249. <i>Bill of lading may be explained by oral evidence.</i></p> <p>§ 250. <i>Express promise to deliver goods in good order, by a day named.</i></p> <p>§ 251. <i>Effect of stipulation for deduction from freight, in case of delay.</i></p> <p>§ 252. <i>If carrier demand full freight, in such case he is liable to refund.</i></p> <p>§ 253. <i>Must be forwarded according to bill of lading.</i></p> <p>§ 254. <i>Effect of separate bills of lading to different owners.</i></p> <p>§ 255. <i>Right of consignee in unlading goods.</i></p> <p>§ 256. <i>Effect of endorsement and delivery of bill of lading.</i></p> <p>§ 257. <i>Exception of responsibility for leakage extends to extraordinary as well as ordinary leakage.</i></p> <p>§ 258. <i>But the carrier must show no want of care on his part.</i></p> <p>§ 259. <i>Statement in bill of lading as to state of goods only primâ facie evidence of fact.</i></p> | <p>§ 260. <i>Passenger's baggage not at his own risk by reason of any notice printed on his ticket and posted in the company's office, unless brought home to the owner.</i></p> <p>§ 261. <i>Bill of lading construed with reference to the nature of the route and the course of business.</i></p> <p>§ 262. <i>The after carriers may pay back freight, in conformity with the bill of lading.</i></p> <p>§ 263. <i>And the bill is conclusive as to third parties who act upon it.</i></p> <p>§ 264. <i>An exception in the bill of lading does not affect its general construction.</i></p> <p>§ 265. <i>The bill is evidence only, as between the parties, but conclusive as to parties acting in faith of it.</i></p> <p>§ 266. <i>But in cases of fraud the estoppel will not bind the owner of a vessel or his interest in it.</i></p> <p>§ 267. <i>Delivery must be made, if practicable, as agreed. Carrier must show loss caused by excepted risks.</i></p> <p>§ 268. <i>Construction of terms of bill of lading affected by usage, etc.</i></p> <p>§ 269. <i>Assignment of bill of lading transfers the title to goods, but not the claim for damages.</i></p> |
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§ 247. It is common for a bill of lading or the receipt for goods, executed by the station-agent, to describe them as in good condition. In such case this is always *primâ facie* evidence against the carrier of that fact, even between the immediate parties to the contract, and may become conclusive upon the carrier, where the consignee or other

parties have acted upon the faith of such representation, and have made advances, or given credit, relying upon its truth.¹

§ 248. But in regard to parties who have no direct interest in the goods, and no authority to adjust any deficiency or damage; who are but intermediate carriers, or middle-men, between the consignor and consignee, such questions cannot be raised, in an action for freight.²

¹ *Shaw*, Ch. J., in *Hastings v. Pepper*, 11 Pick. 43; United States Cir. Court, N. Y. Dist. 7 W. Law J. 302; *Price v. Powell*, 3 Comstock, 322. Declarations of the master, while in charge of the goods, are evidence against the ship-owner. *McCotter v. Hooker*, 4 Selden, 497, where it is held, that a mere receipt for the goods does not merge the previous oral agreement. And a receipt for a sealed package of money, "said to contain" a given amount, is not even *prima facie* evidence that it did contain that amount. *Fitzgerald v. Adams Express Co.*, 24 Ind. 447. Nor is a common carrier bound to receive money for transportation unless properly secured and addressed; nor will the refusal to count the money raise any presumption against the carrier as to the amount. See also *Dunn v. Branner*, 13 La. Ann. 452.

But where the packages are described in the bill of lading "weight and contents unknown," and one of them is in bad condition on arrival, and the mode of packing is such that it would not readily have been discovered, it requires proof that it was not so when delivered. U. S. Circuit Court, *Nelson, J.*, *The Columbo*, 19 Law Rep. 376. In *McCready v. Holmes*, 6 Law Reg. 229, in the District Court of the United States for the District of South Carolina, in October, 1857, it was held, that though a carrier, in the absence of evidence of fraud or mistake, is concluded by the receipt or bill of lading, as to the quantity or amount of the goods shipped; yet, in an action for the freight, where the consignee has received the goods at the wharf, without qualification or reservation of the right to inspect, weigh, or measure them, and the carrier proves due care of them during the transit, and an actual delivery of all in his possession on his arrival, the burden of proof is on the consignee to establish that a deficiency in the quantity specified in the bill of lading, afterwards discovered, is chargeable to the wrongful act or neglect of the carrier.

A bill of lading expressed to have received the goods "in apparent good order," may be explained by parol, and it may be shown that the goods had been in fact injured before received. *Blade v. Chicago, etc., Railw.*, 10 Wisc. 4. The bill of lading is presumptive evidence of the condition of the goods, and if the goods do not arrive, or not in the condition stated, the carrier is *prima facie* responsible. 50 Me. 339; *Great Western Railw. v. McDonald*, 18 Ill. 172.

A contract by which a carrier covenanted with a manufacturer of salt to carry from twelve hundred to five thousand bushels of salt, annually for three years, gives the election as to the amount to the manufacturer. *White v. Toncray*, 9 Leigh. 347.

² *Canfield v. The Northern Railw. Co.*, 18 Barb. 586. In this case, a quantity

§ 249. But where the bill of lading is given, when the goods are so packed as to be incapable of inspection, and prove to have been in fact damaged when they were shipped, this may be shown by oral evidence.³ But as a bill of lading is *quasi* a negotiable instrument, if negotiated it is binding upon the ship-owner.⁴ In general a bill of lading is not to be contradicted and controlled as to the terms of the contract by oral evidence.⁵ And where the carrier

of wheat was shipped at Detroit on board the ship *Argo*, for Ogdensburg, consigned to B. & L., Montpelier, Vt., care of Northern Railw. Co., N. Y. The master delivered the wheat to defendants, in pursuance of the bill of lading, but on measurement it fell short one hundred and seventy-five bushels of the quantity named in the bill. The master demanded freight of defendants upon the quantity carried and delivered, which defendants refused to pay, but offered to pay freight, deducting the deficiency in the wheat. This suit is for the freight demanded. Defendants claimed,

1st. They were not liable for freight, and if so,

2d. They had tendered all the plaintiffs were entitled to demand of them.

It was held, that defendants were liable to the plaintiff for the freight actually earned on the wheat delivered.

On the first point in the defense, the court say, "The usual clause in a bill of lading, making the payment of freight by the consignee a condition of the delivery of the goods, is inserted for the benefit of the carrier. It is regarded as a letter of request from the consignor, and the reception of the property causes an implication that the consignees intend to comply with the request. The law implies a promise upon which the carrier may found an action for the freight. *Abbott on Ship.* 421; 3 *Kent*, 219; 3 *Bing*, 383. This is the settled rule as regards the *final* consignee named in the bill. I see no good reason why a rule, which looks with a single eye to the rights of the carrier, should not be applied to every consignee named, whether *final* or *intermediate*."

As to the second point, the court say, substantially, that defendants were middle-men, all their powers and rights are derived from the terms of the bill of lading, as intermediate consignees, and there is no agency in behalf of the owner, authorizing the defendants to make any adjustment. See also *Bissell v. Price*, 16 *Illinois*, 408.

³ *Gowdy v. Lyon*, 9 *B. Mon.* 112. And a bill of lading for a specified number of tons of iron, "weight unknown," binds the carrier, in the absence of fraud, to deliver only so much as he actually receives. *Shepherd v. Naylor*, 19 *Law R.* 43; *Bissell v. Price*, 16 *Illinois*, 408.

⁴ *Howard v. Tucker*, 1 *B. & Ad.* 512. See also *Cox v. Peterson*, 30 *Alabama*, 608.

⁵ *May v. Babcock*, 4 *Ohio*, 334; *The Schooner Reeside*, 2 *Sumner*, 567; *Angell on Carriers*, §§ 228, 229. And it is not competent to show a usage contradicting the terms of the bill of lading, or the general liability of the carrier. *The Schooner Reeside*, *supra*; *Angell on Carriers*, § 228; *Layword v. Stevens*, 3 *Gray*, 97.

gave a receipt for goods to be forwarded, and specified among other things "one cradle," the cradle being wrapped in a piece of carpet and bound with cords, and the evidence went to show that the plaintiff told one of defendants' agents that it contained a valise, it was held they were liable for the loss of the valise.⁶

§ 250. The stipulation in a bill of lading to deliver goods within a specified time, in good order, the "dangers of the railway, fire, leakage, and other unavoidable accidents excepted," binds the carrier to deliver within the time absolutely, the exception having reference exclusively to the condition of the goods⁷ when delivered.

§ 251. And an agreement to deliver, at the place of destination, on a day named, with a provision that the carrier shall deduct a fixed sum from the freight for each day's delay beyond that time, was held to be an unconditional contract to deliver by the day named.⁷ But the reason and good sense of the case would seem to indicate that if the carrier made the stipulated deduction from freight, fixed in his contract for the delay, he was not liable beyond that for delay merely, and so the court seems to have viewed the subject.

§ 252. But where the carrier in such case demanded full freight, not consenting to deduct the price fixed in the contract for the delay, it was very justly held to be a payment by duress of circumstances, and the excess recoverable of the carrier.⁷

§ 253. In an important case,⁸ recently determined by an

⁶ *Harmon v. New York & Erie Railw.*, 28 Barb. 323.

⁷ *Harmony v. Bingham*, 1 Duer, 209. In this case the covenants to deliver, in a specified time, and in good order, and for the deduction, in case of failure, were separate covenants.

The recovery was in fact limited to the damages specified in the contract, thus making, in effect, a contract to deliver by a certain day, or deduct a certain sum for each day's delay from the freight. See *Place v. Union Express Co.*, 2 Hilton, 19.

⁸ *Bazin v. Richardson*, Circuit Court of the U. S. Philadelphia, May, 1857, Law Reporter, July, 1857, 129. *Merrick v. Webster*, 3 Mich. 268. And in *Bris-*

experienced court, it was held that where the bill of lading required the goods to be reshipped at an intermediate port, by a particular ship, and they were reshipped in another ship, that the contract had not been complied with, and that the carriers must be considered as insuring the goods against loss, even if it arose from causes excepted by the bill of lading. And where goods are delivered to a railway company, for carriage, and a receipt taken by the consignor, upon which he obtains an advance by the consignee, the consignor subsequently obtaining a redelivery of the goods to himself, and the company in consequence being compelled, under threat of legal proceedings against them, to refund to the consignee the money advanced by him, it was held they might recover the amount so paid of the consignor.⁹

§ 254. If the shipper give separate bills of lading to the different owners of wheat shipped under one contract in gross, he is liable to each owner for the conversion of his portion.¹⁰

§ 255. There is a recent English case, in regard to the respective rights of carriers and consignees, depending upon the construction of a bill of lading, of some practical importance. By the terms of the bill of lading the consignee was bound to be ready to receive the goods simultaneously with the ship being ready to unload, and in default the master might land the goods at the expense of the consignee. The consignee not furnishing lighters in

tol v. Rensselaer and Saratoga Railw., 9 Barb. 158, it was held that the receipt of a package marked "L. W. B., care of S. W., Troy," by a railway agent, implied the duty to deliver, according to the mark, and nothing more, although S. W. is another agent of defendants. See also *Fearn v. Richardson*, 12 La. Ann. 752; *Hatchett v. Steamboat Compromise*, id. 783.

⁹ *Midland Great Western Railw. v. Benson*, 30 Law Times, 26. A suit against a carrier for breach of his contract as such must be upon the bill of lading, under the code where such bill is given, and embraces the terms of the contract. The terms of such bill of lading cannot be varied by parol evidence. *Indianapolis, etc., Railw. Co. v. Remmy*, 13 Indiana, 518.

¹⁰ *Wright v. Baldwin*, 18 N. Y. 428.

time, after due notice of the arrival of the ship, the goods were partly landed on the wharf when the consignee arrived with lighters and demanded that the remainder should be delivered into the lighters, which was refused, and the unloading completed on the wharf. A suit being brought for the wharfage due, it was held, that, in the absence of evidence that the carriers would be greatly injured thereby, the consignee was entitled to have the delivery completed into the barges.¹¹

§ 256. The transfer by endorsement and delivery of the bill of lading passes to the endorsee all vested as well as contingent rights of action, even though the goods are not, at the time of the endorsement, still at sea.¹²

§ 257. Where the bill of lading in the usual form contained the memorandum "weight, measurement, and contents unknown, and not accountable for leakage," it was held to protect the carrier as to all leakage, whether ordinary or extraordinary, unless caused by negligence.¹³

§ 258. Where the bill of lading exempted the carrier from responsibility "for rust or breakage," proof of injury to the goods by breakage nevertheless makes out a *prima facie* case of negligence against him; and he must then show the exercise of due care and vigilance on his part to prevent the injury, unless the nature of the injury or of the goods furnishes evidence that due care and diligence could not have prevented the injury.¹⁴

§ 259. The statement in a bill of lading, that goods were received in good order, is not conclusive evidence of that fact; but it is competent to show such was not the fact.¹⁵

¹¹ *Wilson v. London & Italian Steamship Co.*, Law Rep. 1 C. P. 61; s. c., 12 Jur. (N. S.) 52.

¹² *Short v. Simpson*, Law Rep. 1 P. C. 248; s. c., 12 Jur. (N. S.) 258.

¹³ *Ohrloff v. Briscall*, Law Rep. 1 P. C. 231; s. c., 12 Jur. (N. S.) 675.

¹⁴ *Steele v. Townsend*, 37 Ala. 247.

¹⁵ *Ill. Central Railw. Co. v. Cowles*, 32 Ill. 117. The bill of lading binding unless disproved. *Coulthurst v. Sweet*, Law Rep. 1 C. P. 649.

Damage for delay in transportation. — The shipper cannot recover as damages

By such a receipt the onus is put upon the carrier in an action for the non-delivery of the goods, to show that the goods were not in the condition stated in the receipt.¹⁵ And where the evidence is conflicting, and leaves it doubtful whether the alleged default occurred while the carrier sued had charge of the goods or while they were in the custody of another, the court will not disturb the verdict.¹⁵ And a carrier who receives goods from another carrier is responsible directly to the owner of the goods.¹⁵

§ 260. A passenger upon a railway, having a free pass for himself, purchased a ticket for his wife, who accompanied him, and put her trunk in charge of the proper agents of the company, without informing them that the trunk was not his own. He was held entitled to recover against the company for the loss of the trunk, and was held not affected by any notice on the check delivered to him, having printed on its face, "Look on the back," the same notice being posted in the office of the company, among others which it appeared the plaintiff had read.¹⁶

§ 261. A bill of lading for an entire route of transportation consisting of two divisions, is to be construed with reference to the nature of the transit, and the natural and ordinary course of transacting the business connected with the transportation. If in such transport any obstacle should intervene, which by the regular course of the trade is liable to occur and retard the forwarding for a time, the master cannot, on account of not being able to find storage at the port, turn about and carry the cargo to some other port and there store it and depart. He should wait. And, where there is easy telegraphic communication, inform the

the premium paid by him for insurance upon the goods while the vessel was lying in a port to which she was driven for repairs by reason of her unseaworthiness. The carrier, in such case, becomes the insurer. The common carrier owes indemnity to the shipper of goods for delay in the transportation, and legal interest upon the price of the goods during the period of the delay may be recovered, as the measure of such indemnity. *Murrell v. Dixey*, 14 La. Ann. 298.

¹⁶ *Malone v. Boston & Worcester Railw. Co.*, 12 Gray, 388.

consignees of his difficulty, that they may, if they desire, send him instructions.¹⁷

§ 262. It has been held, that a custom to treat the statement of the amount of the goods in a bill, as conclusive upon the carrier, is unreasonable and void.¹⁸ But where the last carrier in a line paid the freight to the former carriers, according to the bill of lading, and in compliance with the custom of the company known to the consignee, it was held they were not responsible for any deficiency in the weight of the cargo, which appeared on reweighing at the termination of the transit, it not being the usual custom of such company to reweigh at such point, and this understood by the consignee.¹⁹

§ 263. A bill of lading has been held conclusive against the master of a vessel in favor of a consignee, not party to the contract, but who had advanced money on the faith of its statements as to the amount and condition of the property, and which from the whole instrument and the usages of trade may be regarded as absolute statements from the master's own knowledge, but it is not conclusive against the owners as to property not shipped, the master having no authority in regard to that.²⁰ But such bill of lading is not conclusive against the master as to the amount of goods put on board, and the consignee cannot recover against the master for the full amount named in the bill of lading, being more than the amount actually put on board, where he has not paid for the goods on the faith of the bill of lading, and is only to pay the shipper for what he receives, unless he can recover of the master the difference

¹⁷ *The Convoy's Wheat*, 3 Wallace, 225.

¹⁸ *Strong v. Grand Trunk Railw.*, 15 Mich. 206.

¹⁹ *Naugatuck Railw. v. Bradsley*, 33 Conn. 218.

²⁰ *Grant v. Norway*, 10 C. B. 665; *Coleman v. Riches*, 16 C. B. 104; *Hubbersty v. Ward*, 8 Exch. 330; *Jessel v. Bath*, Law Rep. 2 Exch. 267. In the case last cited, a printed clause in the bill of lading, "contents and weight unknown," controlled the written entry of the goods being estimated as of a certain weight. See also *Backus v. Schooner Marengo*, 6 McLean, C. C. 487; *Byrne v. Weeks*, 7 Bosworth, 372; *Sears v. Wingate*, 3 Allen, 103.

between this amount and the amount named in the bill of lading.²¹

§ 264. Where the contract of affreightment was general, without naming any exceptions to the risk, and the bill of lading contained the clause, "the dangers of the seas only excepted," it was held not to enlarge the responsibility of the carriers so as to render them liable for loss by the public enemy.²²

§ 265. The bill of lading, as to the receipt of the goods, is not held conclusive upon the parties to the instrument, but only in the nature of evidence, like any other receipt, good until contradicted or qualified by other evidence.²³ But as to third parties, who may have been induced to deal with the goods on the faith of the facts recited in the bill of lading, such recital must be treated as an estoppel upon the parties to the instrument.²⁴ But this principle will not apply in favor of a party who derived his title to the goods before and independent of the bill of lading.²⁵

§ 266. As a general principle the contract of the master in regard to freight binds the ship and the general owner of the ship, although chartered by another, and the master is acting under the orders of the charterer.²⁵ But no such implication arises in reference to bills of lading for property not shipped, designed to be instruments of fraud, and they create no lien upon the interest of the general owner, although the charterer was the perpetrator of the fraud. And although the charterer is estopped in such case from show-

²¹ *Hall v. Mayo*, 7 Allen, 454; *Ryder v. Hall*, id. 456. See also *Kelly v. Bowker*, 11 Gray, 428. The general proposition, that the bill of lading is *prima facie* evidence of the facts recited therein, is maintained in a large number of cases. *Benjamin v. Sinclair*, 1 Bailey, 174; *O'Brien v. Gilchrist*, 34 Me. 554; *Tarbox v. Eastern Steamboat Co.* 50 id. 339; *Allen v. Bates*, 1 Hilton, 221.

²² *Gage v. Tirrell*, 9 Allen, 299. See also *Byron v. Steamboat Belfast*, 40 Alab. 184.

²³ *Meyer v. Peek*, 28 N. Y. 590.

²⁴ Statute 18 & 19 Vict. ch. 111, § 3; *Schooner Freeman v. Buckingham*, 18 How. (U. S.) 182.

²⁵ *Schooner Freeman v. Buckingham*, 18 How. (U. S.) 182.

ing that no property was shipped, that estoppel will not bind the general owner.²⁵

§ 267. Under a bill of lading stipulating for the delivery of the goods at a particular place, this must be done, if practicable, with safety.²⁶ But where the goods are lost by perils, excepted in the bill of lading, the burden of showing that fact rests upon the carrier.²⁸

§ 268. Terms used in a bill of lading, as in other written instruments, will receive such construction as the usage of the business requires.²⁷ But a bill of lading acknowledging the receipt of goods "to be forwarded across the Isthmus," and then to be reshipped, will not make the carrier a mere forwarder as to the transportation across the Isthmus, but he will be regarded as a carrier, notwithstanding the use of the term "forwarded," that being used here in the popular sense of "carried."²⁸

§ 269. In a very elaborate opinion²⁹ by *Shaw*, Ch. J., after two arguments, and one decision of the court to the contrary, the cases are carefully reviewed, and the proposition maintained, that the endorsement of the bill of lading only transfers the title to the goods, and not the right of action in the shipper for any injury done during the transportation, and that an action may be maintained in the name of the shipper to recover for such injury, notwithstanding he has parted with all interest, general or special, in the goods.

²⁵ *Shaw v. Gardner*, 12 Gray, 488.

²⁷ *Wayne v. Steamboat Gen. Pike*, 16 Ohio, 421.

²⁸ *Simmons v. Law*, 8 Bosworth, 213.

²⁹ *Blanchard v. Page*, 8 Gray, 281; *S. P. Joseph v. Knox*, 3 Camp. 320.

CHAPTER XXIII.

CARRIERS' LIEN FOR FREIGHT.

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| <p>§ 270. <i>Lien exists, but damage to goods must be deducted, and freight must be earned.</i></p> <p>§ 271. <i>But if freight be paid through to first carrier, lien does not ordinarily attach.</i></p> <p>§ 272. <i>A wrongdoer cannot create a valid lien against the real owner.</i></p> <p>§§ 273-277. <i>Illustration of the point last stated.</i></p> <p>§ 278. <i>Passenger carrier has lien upon baggage for fare.</i></p> <p>§ 279. <i>Carriers have no lien for general balance of account.</i></p> <p>§ 280. <i>Lien may be waived in same modes as other liens.</i></p> <p>§ 281. <i>Delivery obtained by fraud, goods will be restored by replevin.</i></p> <p>§ 282. <i>Last carrier in the route may detain goods till whole freight paid.</i></p> <p>§ 283. <i>Carrier cannot sell goods in satisfaction of lien.</i></p> <p>§ 284. <i>Owner may pay freight, and sue for goods lost.</i></p> <p>§ 285. <i>Carrier is bound to keep goods reasonable time, if refused by consignee.</i></p> <p>§ 286. <i>Lien does not cover expense of keep.</i></p> <p>§ 287. <i>Covers back charges.</i></p> <p>§ 288. <i>Lien for freight in favor of the last company not affected by defaults of the first company.</i></p> <p>§ 289. <i>Carriers have no lien for freight¹ on goods carried for the national government.</i></p> | <p>§ 290. <i>When goods accepted at intermediate place, freight pro rata. Goods paid for freight may be deducted.</i></p> <p>§ 291. <i>If goods are unlawfully detained, the consignee, being ready to pay freight, may maintain trover, without formal tender.</i></p> <p>§ 292. <i>Consignees endorsing bill of lading, without recourse, or a mere servant or agent, not responsible for freight.</i></p> <p>§ 293. <i>Waiver of lien presumed from unconditional delivery.</i></p> <p>§ 294. <i>Delivery of part of cargo no waiver as to whole. Question of fact.</i></p> <p>§ 295. <i>No lien for dead freight. Owner of vessel chartered to another has no lien for hire of vessel. Sed quære.</i></p> <p>§ 296. <i>No lien for general balance. Such custom void.</i></p> <p>§ 297. <i>What acts by carrier amount to conversion.</i></p> <p>§ 298. <i>No lien for freight until voyage begins, or where special contract as to payment.</i></p> <p>§ 299. <i>Freight may be demanded before delivery. Only payable according to bill of lading, same as § 294.</i></p> <p>§ 300. <i>Lien on goods at end of voyage for all the freight carried.</i></p> <p>§ 301. <i>Where carrier claims more than is due, it dispenses with tender of amount actually due.</i></p> |
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§ 270. As a general rule the carrier is entitled to a lien for freight upon the goods carried.¹ But if he once deliver

¹ Skinner v. Upshaw, 2 Ld. Raym. 752. And so also for advances made for

the goods, this lien is waived.² Or if the goods be damaged in a manner for which the carrier is liable, the owner may deduct the amount of injury from the freight.³ But the goods must be carried and ready for delivery, or the carrier has no right to detain them for freight, the performance of the contract, on the part of the carrier, being a condition precedent to the right to demand freight.⁴

§ 271. In general the consignor of goods is *prima facie* liable to the carrier for freight, but the consignee may, by the implied understanding at the time of shipment, and by freight and storage by other carriers. *White v. Vann*, 6 Humph. 70; *Galena & Chicago Railw. v. Rae*, 18 Ill. 488.

² *Boggs v. Martin*, 13 B. Monroe, 239, 243. This lien extends to all the freight upon the goods throughout their transportation which may be advanced by the last carrier or warehouseman. *Bissel v. Price*, 16 Ill. 408.

³ Same case as n. 2. *Snow v. Carruth*, Dist. Court U. S., Dist. of Mass., before *Sprague*, J., 19 Law Rep. 198, where the cases of *Davidson v. Gwynne*, 12 East, 380, and *Sheelds v. Davies*, 4 Camp. 119; s. c., 6 Taunt. 65, are considered and overruled, so far as this question is concerned.

The right of the owner of the goods to insist upon any damage done the goods, for which the carrier is liable, by way of recoupment, or deduction from the freight, is well established in this country, and is a most elementary principle, as applicable to analogous cases. *Bartram v. McKee*, 1 Watts, 39; *Leech v. Baldwin*, 5 id. 446; *Humphreys v. Reed*, 6 Wharton, 435; *Edwards v. Todd*, 1 Scam. 462. But it is said the carrier is not liable to have damage done by some other party in the transit deducted from his lien. *Bowman v. Hilton*, 11 Ohio, 303. But it is no answer to the carrier's lien that the goods have been damaged during the transit by inevitable accident, to an amount exceeding that of the lien, provided they were still of sufficient value to satisfy it. *Lee v. Salter*, Lalor's Supp. to Hill & Denio, 163.

And where goods were carried by a continuous line of steamboats and railway from New York to Fitchburg, Mass., being delivered upon the pier of the steamboat company in good condition, and having been injured before their arrival at Fitchburg to an amount exceeding the freight, it was held no defense against the claim to set off the damage to the goods against the claim for freight at the suit of the last railway company, in the line of transportation, that the damage accrued to the goods before the goods were laden upon the boat, and without negligence on the part of the carriers. The Court say, the carrier, in such case, may, if he choose, make a special acceptance of the goods, as a warehouseman, during the period between the delivery and the departure, but unless that is shown, he is liable, as carrier, from the time of the delivery for transportation. *Fitchburg & Worcester Railw. v. Hanna*, 6 Gray, 539.

⁴ *Palmer v. Lorillard*, 16 Johns. 348. Opinion of *Kent*, Chancellor, and cases cited.

the relation he sustains to the goods, be the only party liable; or the consignor and consignee may both be liable, either jointly or severally.⁵ But the owner of the goods is always the proper party to bring an action for the loss or injury of the goods, and may generally be held liable for the freight.⁶ The person receiving the goods is responsible for freight, and damages by injury to the goods or non-delivery may be first deducted.⁷ And the relation of debtor and creditor must exist between the carrier and the owner of the goods, so that an action at law might be maintained for the payment of the debt sought to be enforced by the lien.⁸ Hence where one shipped goods at Burlington, upon Lake Champlain, for Detroit, Michigan, care of D., by common carriers, through whom he had previously transported goods to Detroit, and paid the freight in advance; the goods coming into the possession of another line of carriers at Troy, N. Y., without the knowledge of the owner, and being by them transported to Detroit, consigned to the care of F. who was a warehouseman and forwarder, and who, without knowledge of the facts stated, advanced the freight due upon the goods from Troy to Detroit, and refused to surrender them to the owner until reimbursed the amount; in an action of replevin for the goods it was held, that the owner was entitled to possession of the goods, without payment of the freight advanced by F.⁸

§ 272. A common carrier, who innocently receives goods from a wrongdoer, without the consent of the owner, express or implied, has no lien upon them for their carriage, as against such owner;⁹ not even for freight which he

⁵ *Moore v. Wilson*, 1 T. R. 659.

⁶ *Danes v. Peck*, 8 T. R. 330.

⁷ *Hill v. Leadbetter*, 42 Me. 572; *ante*, n. 3.

⁸ *Fitch v. Newberry*, 1 Doug. (Mich.) 1. So, too, if the carrier detain the goods for the payment of a sum beyond the freight, the owner being ready to pay freight, he and his agents are liable in trover, and in such case it is not requisite to make a formal tender of freight. *Adams v. Clark*, 9 Cush. 215; *Isham v. Greenham*, 1 Handy, Sup. Court R. 357.

⁹ *Robinson v. Baker*, 5 Cush. 137.

has paid to a previous carrier, by whom the owner had directed them to be carried.¹⁰ And a lien for freight, where it exists, can only be asserted by the party in whose favor it was created, or some one acting in privity with such party; but such lien presents no obstacle to a recovery, by the general owner of the goods, against a mere wrongdoer.¹¹

§ 273. Mr. Justice *Fletcher*, in delivering the opinion of the court, in the case just cited,⁹ alludes to the fact that so little is found in the books upon this point, and the dictum, in *York v. Grenaugh*,¹² by Lord Chief Justice *Holt*, that in the case of the Exeter carrier, it was held, that where one who stole goods delivered them to a carrier, who transported them by his order, that the carrier thereby acquired a lien upon the goods for the freight, and that this had been adopted by some of the elementary treatises, and by the courts even, *arguendo*, sometimes,¹³ and after referring to the case of *Fitch v. Newberry*, thus continues:—

§ 274. “This decision is supported by the case of *Buskirk v. Purington*, 2 Hall, 561. There property was sold on a condition which the buyer failed to comply with, and shipped the goods on board the defendants’ vessel; on the defendants’ refusal to deliver the goods to the owner, he brought trover, and was allowed to recover the value, although the defendants insisted on their right of lien for the freight.

§ 275. “In the case of *Saltus v. Everett*,¹⁴ it is said, ‘The universal and fundamental principle of our law of personal property is, that no man can be divested of his property

¹⁰ *Stevens v. Boston & Worcester Railroad*, 8 Gray, 262.

¹¹ *Ames v. Palmer*, 42 Maine, 197.

¹² 2 Lord Raym. 866, where it was held that an innkeeper might detain a horse for his keep, although put at the stable by one who came wrongfully by him. But that case differs from a carrier, as the innkeeper cannot ordinarily demand pay in advance.

¹³ *King v. Richards*, 6 Wharton, 418. The court held here that the carrier might lawfully deliver the goods to the rightful owner, and defend against the claim of the bailor, or his assignee, for value, on that ground.

¹⁴ 20 Wend. 267, 275.

without his consent, and consequently that even the honest purchaser, under a defective title, cannot hold against the proprietor.' There is no case to be found, or any reason or analogy anywhere suggested in the books, which would go to show that the real owner was concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently."

§ 276. "The reason, and the only reason given, is, that he is obliged to receive goods to carry, and should therefore have a right to detain the goods for his pay. But he is not bound to receive goods from a wrongdoer. He is bound only to receive goods from one who may rightfully deliver them to him. And he can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods unless the freight is first paid to him, and he may in all cases secure the payment of the carriage in advance.

§ 277. "Upon the whole the court are satisfied that upon the adjudged cases, as well as on general principles, no right of lien for freight can grow out of a wrongful bailment of the goods to the carrier." In a recent English case, it was held, that where carriers receive goods to be carried, there is no estoppel precluding them from disputing the title of the sender. To trover by such a sender it is an answer that the carriers have delivered the goods to the true owner at his request.¹⁵

§ 278. The carrier of passengers has a lien for his charges upon the baggage, but not upon the person of the passenger.¹⁶

§ 279. And neither carriers nor warehousemen have any lien upon goods for a general balance of account against the owner,¹⁷ more than in other cases of lien.

¹⁵ *Sheridan v. New Quay Co.*, 4 C. B. (N. S.) 618; s. c., 5 Jur. (N. S.) 248.

¹⁶ *Story on Bailm.* § 604; *Wolf v. Summers*, 2 Camp. 631; *McDaniel v. Robinson*, 26 Vt. 316.

¹⁷ *Rushforth v. Hadfield*, 6 East, 519; *Hartshorn v. Johnson*, 2 Halst. 108; *Green v. Farmar*, 4 Burr. 2214; *Leonard's Ex'rs v. Winslow*, 2 Grant Cas. 139.

§ 280. As we have said, this lien may be waived by delivery of the goods and the other usual modes of waiving liens, as by accepting security for the freight on time, or where, by the terms of the contract of carriage, the carrier is not to receive pay at the time of the delivery of the goods.¹⁸

§ 281. And where the carrier is induced to deliver the goods to the consignee by a false and fraudulent promise of the latter that he will pay the freight as soon as they are received, the delivery will not amount to a waiver of the lien, but the carrier may disaffirm and sue the consignee in replevin.¹⁹

§ 282. In general the last carrier may detain the goods, not only till his charges, but until all the charges during the transit, are paid. If this is not settled by law, in any place, the custom and course of trade may be shown.²⁰ And in such case, and in all cases of lien for freight, if the goods be delivered without exacting payment of the dues, the owner is liable to the party entitled to demand the same, whether they consist of sums due for services, or advances for the services of other parties, made in the due course of business.²¹ But this only extends to charges strictly connected with the expense of transportation.²²

§ 283. Neither the carrier, nor any other bailee having a lien, can sell the goods, at common law, in satisfaction of

And in *Hale v. Barrett*, 26 Ill. 195, it was held, that where goods belonging to different owners are shipped by one bill of lading, the consignee cannot hold the goods of one for the charges upon the goods of the other. If a warehouseman or consignee deliver goods upon the receipt of a promissory note of the owner for charges, he loses his lien. *Ib.*

¹⁸ *Crawsay v. Homfray*, 4 B. & Ald. 50.

¹⁹ *Bigelow v. Heaton*, 6 Hill, 43; s. c., 4 Denio, 496. See also *Hays v. Rid-
dle*, 1 Sandf. 248.

²⁰ *Lee v. Salter*, Lator's Supp. to H. & Denio, 163. This lien includes all charges during the transit of warehousemen and forwarders. See also *Cooper v. Kane*, 19 Wend. 386; *Dawson v. Kittle*, 4 Hill, 107, as to the effect of usage.

²¹ *Jones v. Pearle*, 1 Strange, 556; *Pothonier v. Dawson*, 1 Holt, N. P. C. 383;

² *Kent*, Comm. 642; *Hunt v. Haskell*, 24 Maine, 339.

²² *Steamboat Virginia v. Kraft*, 25 Mo. 76.

the lien. The appropriate remedy, in such case, is in equity.²³

§ 284. Payment of freight to a common carrier for the portion of a consignment delivered is no presumptive evidence, either of the delivery of the remainder of the consignment, or of release from liability on that account. The consignee in such case has an option, either to set off the loss against the freight, or pay freight and sue for the goods not delivered.²⁴

§ 285. But where the consignee declines accepting the goods, on the ground that the charges are unreasonable, or for any other cause, when the carrier is not in fault, he must still keep the goods safely, for a reasonable time at least. And where they were, under such circumstances, immediately returned to the consignor, in a remote place, it was held the carrier was liable for the damages sustained, and there being a count in trover, it is intimated that such act amounts to a conversion.²⁵

§ 286. But the law gives no right to add to a lien upon a chattel a charge for keeping it till the debt is paid, when it is detained against the will of the debtor.²⁶

§ 287. A warehouseman, with whom goods carried by a railway company are stored, may retain possession of the same, where so instructed by the company, until the back charges thereon are paid.²⁷

§ 288. If an injury occurs, or any loss ensues, by reason of the first carrier, to whom the owner's instructions were

²³ *Fox v. McGregor*, 11 Barb. 41; *Jones v. Pearle*, 1 Strange, 556, and cases *supra*, n. 21.

²⁴ *Moore's Ex. v. Patterson*, 28 Penn. St. 505.

²⁵ *Crouch v. Great Western Railw.*, 31 Law Times, 38; s. c., 2 Hurl. & Nor. 491.

²⁶ *Somes v. The British Empire Shipping Co.*, 8 Ho. Lds. 338; s. c., 6 Jur. (N. S.) 761, affirming the decision of the Queen's Bench and the Exchequer Chamber. This was the case of a ship detained till repairs paid, and the claim was for the use of defendants' dock during the term the ship was detained.

²⁷ *Alden v. Carver*, 13 Iowa, 253. But the carrier cannot insist upon payment of freight before he allows the consignee to inspect the goods. *Lanata v. Grinnell*, 12 La. Ann. 24.

communicated, not fully or understandingly, carrying them through the route, as he should have done, as if the goods are in consequence sent to a wrong place, this will not exonerate the owner from responsibility for the charges of transportation by the subsequent carriers, or affect the validity of their lien, for such charges as they have themselves earned, or advanced to the other companies from the point of original departure.²⁸

§ 289. But common carriers acquire no such lien upon goods transported for the national government, as to justify their detention.²⁹

§ 290. If the owner of the goods accept them at any intermediate place short of the original destination, he will be liable to pay freight *pro rata*.³⁰ And where the carrier pays for the loss of the goods it is equivalent to delivery, and he is entitled to deduct freight.³¹

§ 291. The consignee who is ready to pay freight may maintain trover for the goods for a refusal to deliver them, there being no other legal claim upon them, and he is not bound first to make a formal tender of the freight.³²

§ 292. Where the consignee endorsed the bill of lading to the wharfinger, but not so as to pass the property, in these words: "Deliver to A. or order, looking to him for all freight without recourse to us:" and the ship-owners accepted the endorsement and delivered the goods accordingly, it was held they could not sue the consignee for freight.³³ A mere agent to receive the deliv-

²⁸ *Briggs v. Boston & Lowell Railw.*, 6 Allen, 246. And the fact that there is a compact among all the connecting lines for each successive carrier to deliver to the next and receive his own freight and advances, will not render the last carrier responsible for any default of the former carrier. *Darling v. Boston & Worcester Railw.* 11 Allen, 295; *Carson v. Harris*, 4 Greene (Iowa), 516; *Wilson v. Harvey*, 32 Penn. St. 270.

²⁹ *Dufolt v. Gorman*, 1 Minn. 301.

³⁰ *Lorent v. Kentring*, 1 Nott. & McC. 132.

³¹ *Hammond v. McClurg*, 1 Bay. 101.

³² *Adams v. Clark*, 9 Cush. 215.

³³ *Lewis v. McKee*, Law Rep. 2 Exch. 37. See also *Frye v. Chartered Mercantile Bank*, Law Rep. 1 C. P. 689. But a bill of lading, providing for payment of

ery of goods for another is not personally responsible for freight.³⁴

§ 293. A lien for freight is waived by unconditionally delivering the goods, on the bill of lading, and allowing the larger portion to be placed upon another ship for a foreign port, the assignee being in good credit. And the waiver is not avoided by his estate subsequently proving insolvent.³⁵ But in the case of the *Bags of Linseed*³⁵ it was held, that if the goods are placed in the hands of the consignee with an understanding that the lien for freight is to continue, a court of admiralty will regard it as a deposit of the goods in warehouse, and not as an absolute delivery; and will regard the ship-owner as still constructively in possession sufficiently to preserve his lien. It therefore seems that, as in other cases of lien, a waiver will be presumed from an unconditional delivery.³⁵

§ 294. Delivery of part of the cargo will not operate as a waiver of the lien upon the portion not delivered.³⁶ Where goods are shipped for distinct voyages, having different termini, the lien for one voyage does not extend to the other.³⁶ It is for the jury to say, whether there has been a complete delivery.³⁶

§ 295. A contract to pay what is called dead freight, for the portion of the ship not filled, creates no lien upon the goods sent, for the deficiency.³⁷ The owner of the ship, chartered for the voyage, has no lien for the hire of the vessel,³⁸ because he parts with the possession of it to another, who is, *pro hac vice*, the owner. But where the terms of the charter-party are such, that the owner, in construction of

freight by the consignee on delivery, does not release the consignor. *Christy v. Row*, 1 Taunt. 311; *Collins v. Union Co.*, 10 Watts, 384. Both consignee and consignor may be liable. *Cock v. Taylor*, 13 East, 399.

³⁴ *Amos v. Temperly*, 8 M. & W. 798.

³⁵ *Sears v. Wills*, 4 Allen, 212; *Bags of Linseed*, 1 Black, 108.

³⁶ *Bernal v. Pim*, 1 Gale, 17.

³⁷ *Phillips v. Rodie*, 15 East, 547. See *Small v. Moates*, 9 Bing. 574.

³⁸ *Hutton v. Bragg*, 7 Taunt. 14. But an express contract for lump freight was held to secure a lien upon the cargo. *Kern v. Deslandes*, 10 C. B. (N. S.) 205.

law, retains possession of the vessel, and the charterer only secures a special mode of compensation for freight, the owner's lien continues upon the freight to the extent of his interest.³⁹

§ 296. A carrier cannot by general notice receive a lien for the general balance of account of freight, so as to bind the goods, coming in the name of a factor, for his balance as against the general owner of the goods.⁴⁰ And a general usage or custom to retain all goods for a general lien, for and in the name of the persons for whom the warehouse-keepers are retained and employed, for all balances of account for all advances or expenses for payment of duties, customs, freight, and other charges for conveying, entering, bonding, and warehousing the goods, was held an unreasonable and unjust custom, and one that could not be maintained in law.⁴¹

§ 297. Where the carrier, without demanding freight, stores the goods as his own, it has been treated as a conversion.⁴² And where he or his appointee sells the goods without authority, and the purchaser claims the goods as his own, without setting up the claim of freight, it was held, he could not insist upon any such deduction from the value of the goods. But questions of this character are affected very much by the special circumstances and the good faith of the parties.⁴²

§ 298. The carrier's lien for freight does not attach upon the loading of the goods on board, or until the voyage is entered upon.⁴³ Nor does it attach where by special contract between the parties the time of payment is delayed

³⁹ *Christie v. Lewis*, 5 Moore, 211; s. c., 2 Brod. & B. 410; *Saville v. Cam-
pion*, 2 B. & Ald. 503. When part of the freight is payable in bills on time, the
lien continues till the delivery of the bills. *Yates v. Mennell*, 2 Moore, 297;
Same v. Milk, id. 278; *Same v. Railston*, id. 204. But not for the payment of the
bills. *Gilkison v. Middleton*, 2 C. B. (N. S.) 134; *Tamvaco v. Simpson*, Law
Rep. 1 C. P. 363.

⁴⁰ *Wright v. Snell*, 5 B. & Ald. 350.

⁴¹ *Leukart v. Cooper*, 3 Scott, 521; s. c., 3 Bing. (N. C.) 99.

⁴² *Everett v. Saltus*, 15 Wend. 474.

⁴³ *Burgess v. Grove*, 3 Har. & G., 225; *Clemson v. Davidson*, 5 Binn. 392.

beyond the time of the delivery of the goods.⁴⁴ And where the carrier, under such circumstances, sold the goods at auction for the freight, it was held to be a conversion.⁴⁴ And where by the terms of the contract no lien for freight exists, a court of law cannot give one.⁴⁵

§ 299. As the delivery of the goods and the payment of freight are concurrent acts, and the carrier parts with his lien upon delivery, it is proper for him to refuse delivery, except upon the payment of freight, from day to day and time to time, as the delivery is made.⁴⁶ The *bonâ fide* assignee of the bill of lading, having no knowledge of any claim for freight except that named in the bill, is entitled to the delivery of the goods on the payment of the freight named therein.⁴⁷ But a railway corporation do not waive their lien for freight upon a cargo of coal, by placing it in bins upon their own land adjoining that of the owners, and allowing them to take from the bin, from time to time, and deliver to their customers.⁴⁸

§ 300. Where the contract for freight is for a stipulated sum, each day, between two points, taking in and putting out freight, at certain specified places, it was held, the carrier had a lien upon the goods remaining on board at the return of the boat, for all the freight earned during the day.⁴⁹

§ 301. If the carrier claims a lien upon goods for dead freight, and also for actual freight, and to detain the goods until both are paid, this will dispense with a tender for the actual freight, when that alone is held valid; and the carrier is liable for conversion without the tender of the sum actually due, that being deducted from the amount of the damages.⁵⁰

⁴⁴ *Chandler v. Baldwin*, 18 Johns. 157; *Gracie v. Palmer*, 8 Wheaton, 605.

⁴⁵ *Kirchner v. Venus*, 12 Moore, 361; *How v. Kirchner*, 11 id. 21.

⁴⁶ *Paynter v. James*, Law Rep. 2 C. P. 348; *Black v. Rose*, 2 Moore, P. C. (N. S.) 277.

⁴⁷ *Pollock*, Ch. B., in *Foster v. Colby*, 3 Hurl. & Nor. 715.

⁴⁸ *Lane v. Old Colony Railw.* 14 Gray, 149.

⁴⁹ *Fuller v. Bradley*, 25 Penn. St. 120.

⁵⁰ *Kerford v. Mondell*, 5 Hurl. & Nor. 931.

CHAPTER XXIV.

TIME OF DELIVERY.

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| <p>§ 302. <i>Carrier must deliver goods in a reasonable time, or according to his contract.</i></p> <p>§ 303. <i>Delay caused by unusual press of business, will not make carrier liable.</i></p> <p>§ 304. <i>Or the loss of a bridge from an unusual freshet.</i></p> | <p>§ 305. <i>Carriers excused by the custom and course of the navigation.</i></p> <p>§ 306. <i>Two companies using the same line, one not liable for delay caused by negligence of the other.</i></p> <p>§ 307. <i>Mode of proof in actions for injury to goods.</i></p> |
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§ 302. IN the absence of a special contract, the carrier is bound to perform his duty, *i. e.* deliver the goods at their destination, or, at the end of his route, to the next carrier, in a reasonable time, according to the usual course of his business, with all convenient despatch.¹ And if the carrier

¹ *Raphael v. Pickford*, 5 M. & G. 551; *Broadwell v. Butler*, 6 McLean, 296. But what is reasonable time is a question of fact, depending upon the circumstances of the case. *Id.* *Nettles v. S. C. Railway*, 7 Rich. 190; *id.* 409; *ante*, ch. ii.; *Conger v. Hudson Riv. Railw.* 6 Duer, 375. And the carriers are not justified in adopting a particular mode of forwarding the goods and thereby delaying the delivery, merely because that is the usual mode adopted. *Hales v. London & Northwestern Railw. Co.*, 8 L. T. (N. S.) 421; s. c., 4 B. & S. 66. Nor can the carrier, who contracts to transport goods upon the Missouri River, by steamboat, within a reasonable time, excuse delay, on the ground of such a fall of the water as to render navigation with his own boats impracticable, provided other smaller boats continue their trips with safety. *Collier v. Swinney*, 16 Mo. 484. The delivery of the goods at the end of the transit must be in a reasonable time, place, and manner. *Hill v. Humphreys*, 5 W. & S. 123; *Favor v. Philbrick*, 5 N. H. 358. If the fault of the defendant hinders the delivery of the cargo, the owner of the vessel is entitled to the hire, as upon a full delivery. *Bradstreet v. Baldwin*, 11 Mass. 229. A contract to carry in conformity to directions to be given at an intervening port, implies a duty to give such directions in a reasonable time after arrival at that port. *Woolley v. Reddlelien*, 5 Man. & G. 316. An embargo, being laid upon navigation at an intervening port, only excuses the carrier during its continuance, and he is then bound to complete the voyage, although the embargo had continued for two years. *Hadley v. Clarke*, 8 T. R. 259.

or his servant, within the scope of his employment and duty, enter into any special contract to deliver in any particular time or place, even beyond the terminus of his particular route, it will be binding, and the owner, it would seem, may recover damages, with reference to expected profits, had the goods been delivered in time.² And the acceptance of goods by the consignee at a place short of their destination will not excuse the carrier from responsibility for damages incurred by breach of his contract of affreightment.³ Nor will the acceptance of a part afford any excuse for not delivering the residue.⁴ And where the consignee refuses to accept the goods, it is the duty of the carrier to take such course as he deems most for the interest of the owner, having also proper regard to the security of his own charges; and if he adopts such a course as men of common prudence would, he is not responsible for consequences.⁵ The consignee may at any time dispense with the mode of delivery adopted by the consignor, and the contract between the consignor and the carrier, as implied by law, without any special stipulations, will be to deliver to the consignee at his place of business, unless he shall otherwise order.⁶ And

² *Wilson v. York, Newcastle, & Berwick Railw.*, 18 Eng. L. & Eq. 557; *Hughes v. G. W. Railw.*, 14 C. B. 637; s. c., 25 Eng. L. & Eq. 347. But in *Boner v. The Merch. Steamboat Co.*, 1 Jones (N. C.) 211, it is said that the obligation upon carriers, by which they become insurers, does not extend to the time of delivery. *Parsons v. Hardy*, 14 Wendell, 215; *Story on Bailm.* 545 a. See also, upon this point, *Sangamon & Morgan Railw. v. Henry*, 14 Ill. 156; *Kent v. Hudson River Railw.*, 22 Barb. 278; *Lipford v. Charlotte & South Carolina Railw.*, 7 Rich. 409, and *Nettles v. Same*, id. 190; *Harmony v. Bingham*, 2 Kernan, 99; 1 Duer, 209, where it is held, that if the party enter into a contract to deliver goods within a specified time, he cannot excuse himself by showing delay caused by inevitable necessity; and this is undoubtedly the established rule of law upon this subject, and in regard to all analogous subjects, where the party makes an absolute contract, not providing for any contingency or excuse. *Angell on Carriers*, § 294. See *Nudd v. Wells*, 11 Wisc. 407.

³ *Atkisson v. Steamboat Castle Garden*, 28 Mo. 124.

⁴ *Cox v. Peterson*, 30 Alabama, 608.

⁵ *Steamboat Keystone v. Moies*, 28 Mo. 243.

⁶ *London & Northwestern Railw. v. Bartlett*, 7 H. & N. 400; s. c., 5 L. T. (N. S.) 399. This was a case where wheat was sold to be delivered at the consignee's mill, and forwarded accordingly, and, on its arriving at the station two

if the carrier, instead of delivering to the consignee, keep wheat at the station, and it is injured by remaining so long in the bag, the carrier will not be responsible to the consignor for the loss.⁶

§ 303. But, if the carriers, being a railway company, make no special contract to deliver in any particular time, and a delay happen in the transportation, in consequence of an unusual press in business, the company having a reasonable equipment for all ordinary purposes, and the goods being carried with as much expedition as is practicable under the circumstances, they are not liable for damages.⁷

§ 304. But where the delay in transportation happened in consequence of the loss of one of the company's bridges, by an unusual freshet, and in the mean time the price of the goods depreciated in the market, it was held that the company were not liable, this being the act of God. It was held, that for any injury to the goods, during the delay, the company are liable.⁸

miles from the mill, it was kept there, in consequence of instructions by the consignee that wheat arriving for him should not be forwarded without his written order. And the consignee, having examined the wheat at the station, refused to accept it, and while it remained there it became deteriorated in quality and value. It was held, the consignor had no right of action against the carrier for not delivering the wheat at the mill, as the non-delivery was by order of the consignee. S. C., 8 Jur. (N. S.) 58. See also *Baker v. Steamboat Milwaukee*, 14 Iowa, 214. The property as between consignor and consignee depends upon the contract of the parties and not upon any inflexible rule of law.

⁷ *Wibert v. The New York & Erie Railw.*, 19 Barb. 36 ; s. c., 2 Kernan, 245. In this case it is said, the measure of damages in such cases is not necessarily the differences in prices at the time it should have been delivered and that at which it was delivered. *Galena & Chicago Railw. v. Rae*, 18 Ill. 488.

But it is said in this case, that the company taking grain from wagons, in preference to taking it from private warehouses, is no unjust discrimination. But if the company's servants unjustly give preference to one party over others, in regard to transportation, they will be liable for all damage; and the company must receive freight according to their usual custom, even when that is effected by means of running their cars upon a side track and taking wheat from a private warehouse.

⁸ *Lipfold v. The S. C. Railw.*, 7 Rich. 409. But see *ante*, ch. xxii., n. 4. See also *The May Queen*, *Newberry's Adm.* 464.

§ 305. But the falling of the water in the Ohio River, preventing a boat passing up the falls with its cargo, was held not to come strictly within the exception to the carriers' responsibility. But proof of a long-established usage, uniform and well known, to allow boats, in such cases, to wait a month or more for the rise of water, without incurring liability for not delivering their cargo in a reasonable time, under the usual bill of lading, with "the privilege of reshipment," is admissible. And it was held, that such delay did not deprive the owner of the right to recover full freight.⁹ But a carrier of goods or cattle is only bound to carry in a reasonable time under ordinary circumstances, and is not bound to use extraordinary efforts, or incur extra expense, in order to surmount obstructions caused by the act of God, as a fall of snow.¹⁰ It is said in a recent English case,¹¹ that in the absence of special agreement there is no implied contract on the part of a railway company to deliver with punctuality, but the contract is rather to carry safely and deliver within a reasonable time.

§ 306. Where one company, by agreement under a general act of parliament, confirmed by special act, had running powers over another company's line, and the traffic on the line was delayed by a collision caused by the negligence of the servants of the accessory line, it was held that the company owning the line were not chargeable with any default, by reason of the delay in the delivery of goods caused by such collision.¹¹

§ 307. In an action against a carrier for damage done to goods carried, it is enough to prove the good condition of articles when put into his possession and their deteriorated state when received from him. And any damage resulting

⁹ *Broadwell v. Butler*, 6 McLean, 296.

¹⁰ *Briddon v. Great Northern Railw.*, 28 L. J. 51; 32 L. T. 94.

¹¹ *Great Northern Railw. v. Taylor*, Law Rep. 1 C. P. 385; s. c., 12 Jur. (N. S.) 372.

from bad package will go to lessen the amount of damage.¹²

¹² *Higginbotham v. Great Northern Railw. Co.*, 2 F. & F. 796. And in an action against carriers for injury to casks of oil alleged by them to have arisen from defects in the casks, it was left to the jury whether it arose from such defects, and whether, if it did, the carriers knew or ought to have known of it, and acted negligently in sending them on in that state. *Cox v. London & Northwestern Railw. Co.*, 3 F. & F. 77.

CHAPTER XXV.

CARRIERS HAVE AN INSURABLE INTEREST IN THE GOODS.

§ 308. Carriers may insure for their own benefit.	fire, may insure in trust, and recover the full value.
§ 309. A warehouseman or wharfinger may insure and recover the full value of the goods in trust.	§ 311. The consignee in a bill of lading may be shown to have no insurable interest.
§ 310. Carriers not responsible for loss by	§ 312. Running insurance, on time, apportioned.

§ 308. As carriers become insurers of all goods which they carry against fire, or marine disaster, except from inevitable accident, there can be no doubt they have, to that extent, an insurable interest in the goods, and it has been so held.¹ And this insurable interest continues, so long as the liability of the carrier continues, even where they employ other carriers.¹

§ 309. And a warehouseman or wharfinger with whom goods are deposited has an insurable interest in such goods, although there has been no previous authority given by the general owners to insure, nor any notice given to them of the insurance. Such goods are properly described in a policy as goods "in trust." The insurers in such case are entitled to recover the full value of the goods destroyed by fire, but are accountable to the general owners for the excess of the amount so received above their own

¹ Chase v. Washington Mutual Insurance Company of Cincinnati, 12 Barb. 595. But the carrier has the right, by express contract, to except risks from fire, or any other cause, from his undertaking, and in such case he is not liable for loss by the excepted risk. Parsons v. Monteath, 13 Barb. 353. But upon general principles the first carrier is liable for loss by fire, while the goods are in a float, changing to the next carrier. Miller v. Steam Nav. Co., 13 Barb. 361.

interest in the goods, which in this case extended only to the charges of warehousing.²

§ 310. And common carriers may insure goods in their possession, as carriers, describing them as "goods in trust as carriers," and such an insurance will cover the whole value of the goods, and if the goods are destroyed by fire the carrier will be entitled to recover of the insurer their full value, and it will make no difference that under the statute, or by special contract, the carriers were not responsible for losses by fire.³

§ 311. But the fact that one is named as consignee in a bill of lading is not conclusive proof that he has in his own right an insurable interest. It may still be shown that he was a mere agent.⁴ But unquestionably a factor or broker to whom goods are consigned by the bill of lading may insure in his own name for whom it may concern, and thus recover to the full extent of any insurable interest which he fairly represented.

§ 312. Where a carrier upon a canal effected an insurance for twelve months, for £10,000, upon goods on board thirty boats named between London, Birmingham, etc., backwards and forwards, with leave to take in and discharge goods at all places on the line of navigation; it was held that the policy was not exhausted, when once goods to the value of £10,000 had been carried on all the boats, or by each of them, but that it continued throughout the year, to protect

² *Waters v. The Monarch Life & Fire Ins. Co.*, 5 El. & Bl. 870; s. c., 34 Eng. L. & Eq. 116. "The carrier being responsible for the safe custody and due transportation of the goods, may recover the full value of the goods and hold the same in trust for the owner. *Clifford, J.*, in the *Propeller Commerce*, 1 Black (U. S.) 574, 582. And in cases of insurance for the benefit of carriers, it is a sufficient allegation of interest in the subject matter that the insurance was for the benefit of the plaintiff, as carrier, without alleging that he had paid the owner of the goods their value, or for his interest therein. *Van Natta v. Security Ins. Co.*, 2 Sandf. S. C., 490. The shipper, too, named in a bill of lading, may recover of the carrier for any injury to the goods, although he has no property, general or special, in the goods. *Blanchard v. Page*, 8 Gray, 281.

³ *The London & Northwestern Railw. v. Glyn*, 1 Ellis & Ellis, 652.

⁴ *Seagrave v. Union Marine Ins. Co.*, Law Rep. 1 C. P. 305.

all the goods afloat, at any one time, up to the amount insured, and that upon the loss of goods on board any one of the boats the assured was entitled to recover the proportion of the loss that £10,000 bore to the whole amount of the goods carried during the year.⁵

⁵ *Crowley v. Cohen*, 3 B. & Adolph. 478.

But in *Bridgman v. Steamboat Emily*, 18 Iowa, 509, where the defendants refused to perform their contract to carry goods from Council Bluffs to St. Louis, and gave no excuse for the refusal, or any proof that plaintiffs might readily have obtained transportation otherwise, the defendants were held responsible for the difference in the price of the goods at the two points, at the time they should have arrived, deducting the agreed price of carriage.

And in general, the proper measure of damages in an action for not delivering goods at the place of destination according to the contract or legal duty of the carrier, is the difference in the value of the goods between the place of receipt and delivery. *Bracket v. McNain*, 14 Johns, 170; *Amory v. McGregor*, 15 id. 24; *O'Connor v. Forster*, 10 Watts, 418.

CHAPTER XXVI.

RULE OF DAMAGES AND OTHER INCIDENTS OF ACTIONS AGAINST CARRIERS.

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| <p>§ 313. <i>Damages, for total loss, are the value of the goods at the place of destination.</i></p> <p>§ 314. <i>Goods only damaged, owner bound to receive them, and the amount of damage.</i></p> <p>§ 315. <i>Upon evidence of servants' unfaithfulness or negligence, some explanation must be given, or the company held liable.</i></p> <p>§ 316. <i>Company liable for special damages, where they act malâ fide.</i></p> <p>§ 317. <i>But not ordinarily liable for special damage.</i></p> | <p>§ 318. <i>Consignor owning the goods the proper party to sue.</i></p> <p>§ 319. <i>Consignor in such case not estopped by the act of consignee.</i></p> <p>§ 320. <i>Actions may be brought in the name of bailee or agent.</i></p> <p>§ 321. <i>Recovery in such cases bars the claim of general owner.</i></p> <p>§ 322. <i>Where general property in consignee, he should sue.</i></p> <p>§ 323. <i>Preponderating evidence must be given.</i></p> <p>§ 324. <i>How far a deviation is a conversion.</i></p> |
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§ 313. THE general rule of damages, in actions against carriers, where the goods are lost or destroyed, by any casualty, within the range of the carrier's responsibility, is sufficiently obvious. It must be the value of the goods at the place of destination.¹ And this will commonly in-

¹ *Hand v. Baynes*, 4 Wharton, 204; *ante*, xxiii., n. 2; *Grieff v. Switzer*, 11 Louis. An. 324. See also *Taylor v. Collier*, 26 Ga. 122; *Dean v. Vaccaro*, 2 Head, 488; *Davis v. N. Y. & Erie Railw.*, 1 Hilton, 543; *Mich. etc. Railw. v. Carter*, 13 Ind. 164. See *Harris v. Panama Railw.*, 3 Bosworth, 7, where it is held, that in an action against a carrier to recover the value of property destroyed through his negligence, during its transit, at a place where such property has not been the subject of traffic, or has not been bought and sold, the measure of his liability is the fair value of the property at or near the place of its destruction. But, in determining such value, it would seem that the jury may take into consideration the fact that the property has a market value, at a place other than that where it was destroyed, and to which it was destined, and towards which the carrier, in the course of the usual and regular communication with such place, was then taking it, in connection with the hazards and expenses attendant upon the residue of the intended voyage. See also *Spring v. Haskell*, 4 Allen, 112.

clude the profits of the adventure.² In a well-considered English case,³ Lord *Tenterden*, Ch. J., thus lays down the rule: "The damages ought to be the value of the cargo, at the time when it ought to have been delivered, that is, at the port of discharge." *Parke*, J., said, "The sum it would have fetched, at that time, is the amount of loss sustained by the non-performance of the defendants' contract." But in another case,⁴ where the goods were destroyed at the port of shipment, and before the voyage was entered upon, without the fault of the carrier, it was held he was only responsible for the value of the goods at that port, and no interest should be added even after suit brought.

§ 314. But where the goods are only damaged, the owner is still bound to receive them, and cannot abandon, and go against the carrier as for total loss.⁵ But whether the owner

² Sedgwick on Damages, 356.

³ *Brandt v. Bowlby*, 2 B. & Ad. 932. See also *Gillingham v. Dempsey*, 12 S. & R. 183; *Ringgold v. Haven*, 1 Cal. 108. Trover will not lie against the carrier, or any other bailee, for mere neglect of duty. There must be an actual conversion, or a refusal to deliver on proper request. *Bowlin v. Nye*, 10 Cush. 416; Opinion of court in *Rome Railw. v. Sullivan*, 14 Ga. 283; *Robinson v. Austin*, 2 Gray, 564.

⁴ *Lakeman v. Grinnell*, 5 Bosw. 625. And where the carrier is guilty of unreasonable delay in the transportation, the decline of the price of the goods, in the mean time, is proper to be considered in estimating damages. *Weston v. Grand Trunk Railw.*, 54 Me. 376; *Sisson v. Cleveland & Is. Railw.*, 14 Mich. 489; *Henderson v. Ship Maid of N. O.*, 12 La. Ann. 352. But where goods were sent by railway to plaintiffs' traveller, at C., and failed to arrive before he left, through the fault of the company, it was held that the profits of any expected sale at C. could not be included in the damages. *Great Western Railw. v. Redmayne*, Law Rep., 1 C. P. 329.

⁵ *Shaw v. South Carolina Railw.*, 5 Rich. 462. So also, where the goods are not delivered in a reasonable time, the owner can only recover damage of the carrier. *Scoville v. Griffith*, 2 Kernan, 509; *Hackett v. C. B. & M. Railw.*, 35 N. H. 390. Where part only of the goods are injured, the carrier is liable only for that part, nor is his liability enhanced by failure to offer to deliver the uninjured part. *Mich. etc. Railw. v. Bivens*, 13 Ind. 263. Where a portion of goods shipped by one entire contract of affreightment is lost by fault of the carrier, and the residue is sold by him by the bill of lading at the port of delivery without knowing such loss, the carrier, if sued by the consignee for money had and received from the proceeds of the sale, cannot deduct the freight, but may deduct a discount allowed by him to the purchaser on discovering the deficiency in the goods. *Stevens v. Sayward*, 8 Gray, 215.

have accepted the goods, or not, he may recover for any deterioration they have sustained, unless by the excepted risks in the carrier's undertaking.⁶

§ 315. In an action against a carrier, slight evidence having been given that the porter of the carrier stole the goods, and the jury having found for the plaintiff, a new trial was denied, on the ground that the carrier did not offer the porter as a witness.⁷ And in an action against a railway

⁶ Bowman v. Teall, 23 Wendell, 306.

⁷ Boyce v. Chapman, 2 Bing. (N. C.) 222. And upon general principles the plaintiff makes a *prima facie* case, by showing that the goods did not reach their destination. Story on Bailm. § 529 a; Woodbury v. Frink, 14 Ill. 279; Bennett v. Filyaw, 1 Florida, 403; Bark Oregon, Newberry's Adm. 504; Brig May Queen, id. 464. But where the carrier has, by notice, or special contract, limited his responsibility as a common-carrier, the burden of proof of showing negligence is upon the consignee, the same as in ordinary suits, charging neglect of duty. Id. But where the bill of lading states the goods to have been shipped in good order, and they arrived in a damaged state, the burden of proof is upon the carrier, to show that the damage occurred by causes for which by the bill of lading he was not responsible. The Propeller Cleveland, id. 221. And where in such case, the carrier shows the existence of facts from which this could be fairly inferred, it devolves upon the shipper to show that the damage might have been prevented by the exercise of ordinary care and skill on the part of the carrier. 1b.

And where the carrier at first wrongfully refused to deliver goods consigned to a manufacturer, but afterwards delivered them, it was held that he was not liable for consequential damages, from the delay of the consignee's works, or the consequent loss of profits, but only for the expense of sending a second time for the goods. Waite v. Gilbert, 10 Cush. 177. Perhaps the manufacturer was entitled to some consideration, by way of damages, until he could have supplied himself, in other ways, with similar materials, if indispensable for his present use. But to recover such special damages, which are not the natural or ordinary result of the act complained of, it is probably necessary in strictness, to declare specially. But in a late case in the Court of Exchequer, for not carrying a passenger according to the carrier's duty and contract, it was held that no such remote and accidental damages are recoverable, in any form. Hamlin v. Great Northern Railw., 1 H & N. 408; s. c., 38 Eng. L. & Eq. 335. See *post*, pt. iii. ch. viii., n. 2. But in a very late English case, Mullett v. Mason, Law Rep. 1 C. P. 559; s. c., 12 Jur. (N. S.) 321, where the plaintiff bought of the defendant a cow, on the assurance of the latter that he would warrant her, and that she had come off his father's farm, and it proved to be a foreign cow, and in a few days died of the cattle plague, and thereby caused the death of other cows belonging to plaintiff, it was held that he might recover the value of other cows so lost. And in a recent case in Admiralty, Dr. Lushington allowed the master his expenses in defending himself in a foreign port against a

for negligence, if the plaintiff show damage, resulting from an act of defendants, he makes a *prima facie* case, and the defendant must show that he was in the exercise of the requisite degree of care, or else that such a state of circumstances existed as rendered all exercise of care unavailing, and this is so although the act complained of is one, which, with proper care, does not ordinarily produce damage.⁸

§ 316. In a late English case,⁹ it is held, that if a railway company omit to deliver bundles of packed parcels, in time, with a view to injure the plaintiff's business, as a collector

charge of murder brought against him by two of the crew whom he had justly chastised on the voyage, and for £10 paid as the penalty of the recognizance required of him on his acquittal to prosecute the men for perjury, but which he elected to forfeit in order to continue his voyage. The allowance was made on the ground that the master was entitled to the expenses of his defense, as the charge originated directly from the performance by the master of his duty to the owners in chastising the men; and also that it was for the interest of the owners that the master should forfeit his recognizance and not be delayed in returning with the vessel. *The James Seddon*, Law Rep. 1 Adm. & Ecc. 62; s. c., 12 Jur. (N. S.) 609. But in the case of *Gee v. Lancashire & Yorkshire Railw. Co.*, 3 Law T. (N. S.) 238; s. c., 6 H. & N. 211, where an action was brought against a carrier for delay in delivering goods, when there was no special contract, and the judge directed the jury to find a certain sum for the wages of the plaintiff's servants, who were kept out of employment by the non-arrival of the goods; and also left it to the jury to name the amount the plaintiff should recover for the loss of profits for the same cause, it was held to be a misdirection, on the authority of *Hadley v. Baxendale*, 9 Exch. 341. The cases are somewhat numerous of late in the English courts, where the carrier, who acts in good faith and fails to deliver goods in such time as he might have done with proper diligence and therefore ought to have done, is held not liable for speculative loss of expected profits, but only for the particular loss upon the article thus failing to be delivered in proper time. *Wilson v. Lancashire & Yorkshire Railw. Co.* 9 C. B. (N. S.) 632; s. c., 7 Jur. (N. S.) 862; *Collard v. Southeastern Railw. Co.*, 7 H. & N. 79; s. c., 7 Jur. (N. S.) 950; *Simmons v. Southeastern Railw. Co.*, 7 H. & N. 1002; s. c., 7 Jur. (N. S.) 849; *Rice v. Baxendale*, 7 H. & N. 96. If there is no market at the place of delivery, the jury may give the cost of the articles, and reasonable expenses and profits. *O'Hanlan v. Great Western Railw. Co.*, 6 B. & S. 484. See also *Tardos v. Ship Toulon*, 14 La. Ann. 429. And the owner of baggage lost by a railway company, while he was a passenger, can only recover the value of the things lost, and nothing for expenditure, consequent upon the loss. *New O. Railway v. Moore*, 40 Miss. 39; *C. & Ch. Railw. v. Marcus*, 38 Ill. 219.

⁸ *Ellis v. Portsmouth & Raleigh Railw.*, 2 Iredell, 138.

⁹ *Crouch v. Great Northern Railw.*, 11 Exch. 742.

of parcels, and thereby create a monopoly in themselves, they will be liable to the special damage resulting therefrom, but not otherwise.

§ 317. Where a plan and models sent to compete for a prize were lost by the carriers, it was held, the proper measure of damages is the value of the labor and materials expended in making the articles, and not damages from losing the chance of obtaining the prize; the latter being too remote.¹⁰

§ 318. The consignor, who owns the goods, and sustains the injury from the damage or loss, is the proper party to bring the action against the carrier.¹¹ In an action against the carrier for the loss of the plaintiff's goods, it is no answer that the goods were delivered to the defendant by one who, as consignor, claimed compensation for the loss, and that the defendant paid him as such consignor, without notice that he was not the owner of the goods.¹² The

¹⁰ *East Anglian Railw. v. Lythgoe*, 10 C. B. 726. But where the owner of the goods sustains special damage, by reason of the goods being rendered unfit for the particular use for which they were procured, the jury may consider how much they are lessened in value thereby, and give damages accordingly. *Hackett v. B. C. & M. R.*, 35 N. H. 390. And where machinery was sent to Vancouver's Island to erect a mill, and on the delivery, one of the cases was missing, and its place had to be supplied by sending to England, it was held that only the value of the missing machinery with the expense of procuring it, could be recovered, and nothing for loss by reason of the mill not going sooner into operation. *British Columbia Saw-mill Co. v. Nettleship*, Law Rep. 3 C. P. 499.

¹¹ *Sanford v. Housatonic Railw.*, 11 Cush. 155; *Coats v. Chapin*, 2 Q. B. 483; *Freeman v. Bird*, id. 491, in n.; *Sargent v. Morris*, 3 B. & Ald. 277. But the consignee is *primâ facie* the owner of the goods, and in the absence of proof to the contrary, will be so regarded. *Arbuckle v. Thompson*, 37 Penn. St. 170; *Potter v. Sawing*, 1 Johns. 215; *The Merrimack*, 8 Cranch, 317. On an assignment for the benefit of another, the assent of the latter will be presumed. *Grove v. Brien*, 8 How. (U. S.) 429; *Ashmead v. Borie*, 10 Penn. St. 254. And it is here said, the consignee may accept the goods at an intermediate port or place. And as a general rule the delivery of goods by the vendor to the carrier, on behalf of the vendee, is a delivery, in law, to the vendee; and he alone can maintain an action against the carrier for non-delivery. *Dutton v. Solomonson*, 3 B. & P. 582; *Jacobs v. Nilson*, 3 Taunt. 423. The action must, as a general rule, be in the name of the owner of the goods. *Law v. Hatcher*, 4 Blackf. 364. But see *Goodwyn v. Douglas*, Cheves, 174.

¹² *Coombs v. Bristol & Exeter Railw.*, 3 H. & N. 1.

decision here seems to go upon the ground that there was nothing in the case to indicate that the consignor was the owner of the goods; or that he was allowed to represent the plaintiff in any such way as naturally to mislead the defendants. It is unquestionably the duty of the carrier to see that he delivers goods to the party entitled, and if he do not, although he be misled by a gross fraud, or even by a forged order, he is not excused, but is liable in trover.¹³ And by parity of reason, if the goods are lost the carrier should, before he pays any one, ascertain whether the property of the goods was in him; otherwise he would pay in his own wrong, if it should turn out the property was in another, since the contract, by construction, is with the party entitled to claim the goods. And whether it be the consignor or consignee, will depend upon circumstances readily learned upon inquiry.¹⁴ A warehouseman is regarded in the light of a middle-man, and may even dispute the title of the party delivering goods to him, and in defense of an action of trover show that the title is in some third party, who has forbidden the goods being delivered to the bailor.¹⁵ This may be at variance with some of the old cases and with much which may be found in the elementary books; but it is consistent with reason and justice, and will not be found embarrassing in practice, with one qualification, that the bailee of goods will be permitted to set up the *jus tertii* in his own defense, when he is so situated as to be made responsible to such party in case of a recovery

¹³ *Ostander v. Brown*, 15 Johns. 39; *Hawkins v. Hoffman*, 6 Hill, 588; *Powell v. Myers*, 26 Wendell, 591, *Bronson, J.*; *Clarke v. Spence*, 10 Watts, 337, *Rogers, J.*

¹⁴ *Watson, B.*, in *Coombs v. Bristol & Exeter Railw.*, 3 H. & N. 1.

¹⁵ *Thorne v. Tilbury*, 3 Hurls. & N. 534. See cases cited in the argument of this case. Where the owner of the goods induces the carrier to carry them for a less price by representing them of inferior value, he can only recover the amount he represented their value to be, in case of loss or damage. *McCance v. London & Northwestern Railw. Co.*, 7 H. & N. 477; 7 Jur. (N. S.) 1304; s. c., affirmed in Exchequer Chamber, 10 Jur. (N. S.) 1058; 3 H. & C. 343. See also *Robinson v. London & Southwestern Railw. Co.*, 19 C. B. (N. S.) 51; s. c., 11 Jur. (N. S.) 390.

by the present claimant, unless he do so urge the claim of such other party in his own defense. Such a state of the case will occur always where the third party has demanded the thing of the bailee and forbid his delivering it to the bailor ; and also where the bailment is so made as to create a trust in behalf of the real owner, or party justly entitled to demand possession.¹⁵

§ 319. A receipt for the goods, by the consignee, acknowledging to have received them in good order, and in which he is requested to notice any errors therein, in twenty-four hours, or the carrier will consider himself discharged, does not estop the consignor, from suing the carrier for damage of the goods, although no notice thereof was given the carrier.¹¹

§ 320. Actions against carriers may be brought in the name of bailees, or agents, who have the rightful custody of the goods, and who make the bailment, or in the name of the owner.¹⁶

§ 321. But it is well settled, that a recovery for the goods, of the first or any subsequent carrier, in the name of any one having either a general or special property in the goods, in an action properly instituted, will be a bar to any subsequent suit against the same person, at the suit of another party, having either a general or special property in the goods.¹⁷

§ 322. Where the general property in the goods vests in the consignee, upon delivery to the carrier, the consignor has ordinarily no property remaining, even where he pays the freight.¹⁸

¹⁶ *Elkins v. Boston & Maine Railw.*, 19 N. H. 337; *White v. Bascom*, 28 Vt. 268. See *Wing v. N. Y. & E. Railw.*, 1 Hilt. 235. *Semble*, where a contract is made with a railway company to carry goods to a given point, and while *in transitu* the goods are reshipped by that company upon another road, the latter company would be liable directly to the owner for a loss of the goods through their neglect. *Illinois Central Railw. v. Cowles*, 32 Ill. 116.

¹⁷ *White v. Bascom*, 28 Vt. 268; *Green v. Clark*, 13 Barb. 57; s. c., 2 Kernan, 343.

¹⁸ *Green v. Clark*, *supra*. And where a box containing jewelry was delivered

§ 323. In the trial of actions against carriers, where the goods or baggage pass over successive lines of transportation, it has been held insufficient evidence to charge the first carrier to show the delivery of the goods to him, and the failure of their arrival at the place of destination, thus leaving the case without any preponderating evidence to show that they were not delivered to the second carrier.¹⁹

§ 324. It has been held, that if the carrier deviate from the regular route, and the goods are lost, it is a conversion.²⁰ This may be sound law, provided there is no just occasion to depart from the ordinary route, and the deviation consequently shows a wanton abuse of the bailment, but otherwise it could only render the carrier responsible for any damage which should accrue. And where goods coming from a foreign country and which are dutiable are consigned to an agent for the mere purpose of securing the payment of the duties, the carrier, having knowledge of the limited character of the agency, will not be justified in changing the destination of the goods, upon the direction of such person, and if he do so, is guilty of a conversion.²¹

to a carrier by a servant under instructions from both plaintiffs, the box being the property of one of them, and the jewelry being their joint property, but was addressed to one of them only at a specified place, it was held there was evidence of a joint bailment by both plaintiffs. *Metcalf v. L. B. & So. Coast Railw.*, 4 C. B. (N. S.) 307, 317; 31 Law T. 166.

¹⁹ *Midland Railw. v. Bromley*, 17 C. B. 372; s. c., 33 Eng. L. & Eq. 235. In general the carrier is liable upon proof of loss or deficiency in the goods upon arrival at their destination unless he give exculpatory evidence. *Hawkes v. Smith*, 1 Car. & M. 72. But it must clearly appear that the missing goods were actually contained in the trunk or package when delivered to the carrier. *McQuesten v. Sanford*, 40 Me. 117.

²⁰ *Phillips v. Brigham*, 26 Ga. 617.

²¹ *Clafin v. Boston & Lowell Railw.*, 7 Allen, 351.

CHAPTER XXVI.

DEMURRAGE.

§ 325. *The nature of the claim.*

§ 326. *Damages in the nature of demurrage.*

§ 327. *A carrier has no lien upon the cargo for any claim in the nature of demurrage.*

§ 325. DEMURRAGE is a claim by way of compensation for the detention of property which is subsequently restored. As where a ship and cargo were detained by an illegal seizure, and discharged without ultimately obtaining a certificate of probable cause, the owner was held entitled to damages by way of demurrage for the detention of the ship, and interest upon the value of the cargo.¹ So also, where by the established regulations of a railway, demurrage was charged on sacks furnished for transportation of grain, after the expiration of fourteen days; but by another of the regulations of the company none of the company's sacks containing grain were allowed to leave any station after having reached their destination, unless a guaranty is first obtained from the consignee that the sacks shall be returned.

§ 326. Although demurrage, strictly speaking, is only due when expressly stipulated for in the contract for freightment, yet where the vessel is detained an unreasonable time in unloading, the owner may recover damages, in the nature of demurrage, for such detention. But in such action the owner or charterer of the ship would only recover compensation for the time the vessel was unreasonably delayed, and not for consequential damages in consequence.²

¹ *The Apollon*, 9 Wheaton, 362.

² *Clendaniel v. Tuckerman*, 17 Barb. 184.

§ 327. A railway has no lien for the compensation impliedly due them for the detention of their cars an unreasonable time, in discharging the cargo, the cars remaining during the time in a public highway.³

³ *Crommelin v. New York & Harlem Railw.*, 10 Bosw. 77.

CHAPTER XXVII.

COMMON CARRIERS OF FREIGHT OR PASSENGERS BY WATER. PECULIARITIES OF THEIR RIGHTS AND DUTIES.

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| <p>§ 328. <i>Covenants in a charter-party will be construed as independent and not conditions precedent, where that can fairly be done.</i></p> <p>§ 329. <i>Freight stipulated to be carried for so much the cubic foot is to be estimated at the time of shipment.</i></p> <p>§ 330. <i>The owner of a ship responsible to freighters so long as he continues actually in possession of the ship, either by himself or the master and seamen.</i></p> <p>§ 331. <i>The delivery of goods and payment of freight concurrent acts. The carrier not bound to deliver until the consignee is ready and willing to pay freight.</i></p> <p>§ 332. <i>How far common carriers of goods or passengers may recover pro rata itinerum.</i></p> <p>§ 333. <i>The shipper, whether the owner of the goods or not, is always primarily liable to the carrier for freight, and the latter is not obliged to refuse to deliver goods until the freight is paid, unless he so stipulate.</i></p> <p>§ 334. <i>If the carrier deliver the goods to the consignee without exacting freight,</i></p> | <p><i>trusting to the consignor, he cannot afterwards assert any such claim on the bankruptcy of the consignor.</i></p> <p>§ 335. <i>How far carriers of passengers by water are liable to actions for not furnishing satisfactory subsistence.</i></p> <p>§ 336. <i>The captain in such cases cannot justify excluding a passenger from the salon table, unless he conducts disorderly, so as to disturb the quiet and comfort of others, at table.</i></p> <p>§ 337. <i>How far carriers are responsible for goods damaged or lost by being stowed upon deck.</i></p> <p>§ 338. <i>The carrier is bound to know or learn the laws and regulations of the port of destination, and conform thereto; and if he fail to do so, is responsible for the consequences.</i></p> <p>§ 339. <i>How far passenger carriers by water, will be excused for refusing to carry obnoxious persons to places where their presence might probably excite riot; or in sending them back to the place of departure, from considerations of prudence and humanity.</i></p> |
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THE responsibilities and duties of common carriers by water do not differ essentially from those attaching to the same class of persons, in other modes of transportation, except as the modes of receiving and discharging freight, necessarily, or according to convenient usages, modify them. And it will be the purpose of the present chapter to point

out these modifications, and some very few peculiarities attaching to passenger transportation by water.

§ 328. In charter-parties, as well as in other contracts, covenants will be construed as independent and not as conditions precedent, if that can fairly be done, as in the case of a stipulation to proceed to a certain place and there take in a cargo, and the ship deviated slightly and this operated to the disadvantage of the freighter. But it was held not to avoid the contract, and that the freighters were bound to furnish the cargo,¹ and liable to an action for refusing to do so.

§ 329. A contract to carry a cargo at the rate of "\$7.55 per ton of 50 cubic feet delivered, the freight to be paid on right delivery of the cargo," is to be construed as applying to the freight at the time of delivery. And if, being cotton, and being subject to high hydraulic pressure, according to the usual practice, it should considerably expand before arriving at its point of destination, that will not entitle the carrier to any additional compensation.²

§ 330. Where a ship under a charter-party, is advertised as a general ship, and one consigns goods, without knowing of the existence of the charter-party, and the ship remains in the possession of the owners by their master and servants, the same as before the charter-party, it was held such person might recover of the owners the same as if no charter-party existed.³ Where a charter-party provided there should be no liability for detention of the ship by ice, and it was necessary to use lighters in loading the vessel, and lighterage was delayed by ice, it was held there was no liability for the detention.⁴

§ 331. As we have already seen,⁴ the delivery of the cargo and the payment of freight are to be regarded as

¹ *McAndrew v. Chapple*, Law Rep. 1 C. P. 643.

² *Buckle v. Knoop*, Law Rep. 2 Exch. 125, 333.

³ *Sandermen v. Scurr*, Law Rep. 2 Q. B. 86; *N. Haven S. B. Co. v. Vanderbilt*, 16 Conn. 420.

⁴ *Hudson v. Ede*, Law Rep. 2 Q. B. 566; *S. P. in The Great Eastern*, Law Rep. 2 Adm. & Eccl. 88.

concurrent acts, and the carrier by water, who stipulates in the bill of lading for the payment of freight "on right delivery of the cargo," is not obliged to deliver the goods until the consignee is ready and willing to pay the freight.⁶ And where the consignee declined to pay freight until the goods were placed in his store, the master stored the goods in a warehouse, subject to his own order, and gave notice to the consignee; on a libel against the vessel for non-delivery of the goods, to which the ship-owners pleaded non-payment of freight, it was held they were not responsible for the misconduct of the warehouseman, while the goods were in his possession.⁷ A contract for freight is an entire contract and not apportionable.

§ 332. And where by the terms of a charter-party the defendants covenanted to pay so much as freight of goods delivered at A., it was held that freight could not be recovered *pro rata itineris*, if the ship was wrecked short of her destination at A., although the defendant accepted his goods at the place where the ship was wrecked.⁸ It is the duty of the carrier in such case, either to repair his ship or procure another, and perform the voyage, when he will be entitled to freight under the contract.⁹ But although the carrier cannot recover upon the special contract, without proving full performance on his part, the acceptance of the goods by the owner short of their ultimate destination, will generally be regarded as implying the assent on his part to pay freight, ratably for the portion of the carriage performed. But the action should not be brought upon the original contract, without alleging the subsequent modification by the acceptance of the goods short of their original destination.⁹ And the same general rules seem to have been

⁶ Paynter v. James, Law Rep. 2 C. P. 348.

⁷ The Eddy, 5 Wallace, 481.

⁸ Cook v. Jennings, 7 T. R. 381.

⁹ Lawrence, J., in Cook v. Jennings, *supra*. See also Luke v. Lyde, 2 Burrow, 882, and the comments upon the same. Rossiter v. Chester, 1 Doug. (Mich.) 154.

applied to the question of passage-money, where the passage fails to be performed. The carrier cannot retain the whole passage-money or maintain an action for it, unless he carry the passenger to his destination; nor can he retain or recover *pro rata itineris*, unless he have performed beneficial service, and then not upon the original contract, but upon a *quantum meruit*, or on the ground of the newly given assent of the passenger to terminate the contract after part performance.¹⁰ Freight *pro rata itineris* is never due unless the owner of the cargo voluntarily receive it, at a place short of its destination.¹¹ And where the carrier declines to repair his ship or procure another to forward the goods, the acceptance of the same by the shipper is not to be regarded as altogether voluntary.¹¹ But the expense of overland transportation, after the goods have been unconditionally received by the consignee at an intermediate port, must be borne by him.¹² The reservation in the bill of lading of the right of re-shipment of the goods, does not discharge or affect the responsibility of the carrier for the safe delivery of the goods.¹³ And where one buys a passage ticket for a particular steamer, which had been at the time lost at sea, without the knowledge of the parties, the holder of the ticket can only recover the amount paid for it.¹⁴

§ 333. It seems to be well settled, that where goods are shipped in the ordinary mode, by bill of lading, it will be regarded as an express contract on the part of the shipper, to pay the freight to the carrier, unless the same is paid by the consignee or some other one, although the shipper is not the owner, and the carrier is not obliged to retain the goods until the freight is paid, unless he so stipulate. The usual provision in such contracts, that he may do so, is regarded as intended exclusively for the benefit of the carrier,

¹⁰ *Mulloy v. Backer*, 5 East, 316; *Leman v. Gordon*, 8 C. & P. 392.

¹¹ *Caze v. Baltimore Ins. Co.* 7 Cranch, 358; *Welch v. Hicks*, 6 Cow. 804.

¹² *Reed v. Dick*, 8 Watts, 479.

¹³ *Little v. Simple*, 8 Mo. 99; *Whitesides v. Russell*, 8 Watts & S. 44.

¹⁴ *Bonsteel v. Vanderbilt*, 21 Barb. 26.

and one which he may waive, at his election, and rely upon his remedy against the shipper.¹⁵ But it is held that the party who obtains goods under a bill of lading impliedly stipulates to pay the freight.¹⁶ But this is merely a cumulative remedy in favor of the carrier.¹⁷ And it was accordingly held,¹⁸ that where, by the charter-party, the ship was to deliver goods in London, on the payment of freight, and by the bills of lading the goods were stipulated to be delivered to the shipper or his assigns, he or they paying freight as per charter-party; and some of the goods were sold and the bills of lading assigned to the defendant, before the arrival of the goods, and the portion sold defendant, upon arrival in London were entered at the custom-house and docks in the name of the defendant, he paying the duties and dues, and obtaining possession of the goods under the bill of lading and indorsement, that no contract was by law implied on the part of the defendants to pay freight; that was matter of fact to be judged of by the jury from all the facts and circumstances attending the sale. This decision of the Queen's Bench was affirmed in the Exchequer Chamber, that court holding that if such a contract were implied or inferred from the facts, no action of *indebitatus assumpsit* could be maintained. But if the bills of lading had not referred to the charter-party, so as to be in some sense qualified by it, but had merely stated that the goods were to be delivered to the consignee or his assigns on their paying freight, the taking of the goods under the indorsement would have been evidence from which a jury might have inferred a contract to pay freight;

¹⁵ *Wooster v. Tarr*, 8 Allen, 270; 8 Gray, 281, 286, 291-295; *Shepard v. DeBernalles*, 13 East, 565; *Domett v. Beckford*, 5 B. & Ad. 521-525; *Christy v. Row*, 1 Taunt. 300. The opinion of *Bigelow*, Ch. J., in the case of *Wooster v. Tarr*, presents the law on this point in a very satisfactory manner. See also *Barker v. Havens*, 17 Johns. 234; *Layng v. Stewart*, 1 Watts & S. 222.

¹⁶ *Dougal v. Kemble*, 3 Bing. 383.

¹⁷ *Bigelow*, Ch. J., in *Wooster v. Tarr*, *supra*.

¹⁸ *Sanders v. Vanzeller*, 4 Q. B. 260.

but even in such a case no such contract would arise by mere implication of law, and consequently *indebitatus assumpsit* would not lie. The court refused to award a *venire de novo*, and affirmed the judgment for the defendant. And in a later case,¹⁹ it was held that the liability of the consignee or indorser of the bill of lading for freight, in such cases, is not the result of the original contract of afreightment but of a new contract, the consideration for which is the delivery of the goods to him at his request.

§ 334. But where the carrier delivers the goods to the indorsee of the bill of lading, without exacting from him the payment of freight, and debits the same to the consignor or shipper, he cannot, after the bankruptcy of the latter, assert a claim for freight, either against the goods or the party to whom he delivered them.²⁰

§ 335. Questions have sometimes arisen, in passenger transportation by water, where the subsistence is naturally supplied by the carrier, in regard to the extent of departure from what might be regarded comfortable fare will subject the carrier to an action. That must depend altogether upon circumstances, and how far the carrier puts in proper supplies and furnishes such subsistence as might fairly have been expected, under the circumstances. And it is so much the practice of passengers to find fault with their fare, upon voyages of any considerable extent, when the difficulty is more in themselves than anywhere else, that the courts have not, as a general thing, manifested much readiness to listen to complaints of this character. The demands of passengers, far removed from land, and without any sound

¹⁹ *Kemp v. Clark*, 12 Q. B. 647. See also *Holt v. Wescott*, 43 Me. 445; *Fox v. Nott*, 6 Hurl. & Nor. 630.

²⁰ *Tobin v. Crawford*, in Exchequer Chamber, 9 M. & W. 716. So if the carrier trust to the consignee for freight he cannot fall back upon the consignor because the consignee becomes bankrupt, before the payment of the freight, he being ready to pay it at the time of receiving the goods, but the party appointed in the bill of lading to receive the same not being present to receive it. *Thomas v. Snyder*, 39 Penn. St. 317.

and healthy appetites, are often very absurd, or, at least, unreasonable. It was accordingly said,²¹ that in an action against the captain of a ship, for not furnishing good and fresh provisions to a passenger on a voyage, the jury must be satisfied that there has been a real grievance sustained by the plaintiff, that he has really been a sufferer; for it is not because a man does not get so good a dinner as he might have had, that he is therefore to have a right of action against the captain, who does not provide all that he ought. The passenger must have sustained a real grievance, and not one that is mainly imaginary.

§ 336. Questions sometimes have arisen, in the English courts, how far the captain of a passenger ship may justify excluding a passenger from the table, in the caddy or salon, and require him to take his meals in his own apartment, on the ground of ungentlemanly manners or conduct. Such questions would not be likely to occur either there or here, at the present day, unless from the excessive use of stimulus, or passionate excitement of some kind. Where a passenger behaves as well as he knows how, it is all that can be required. If he still fails to meet the demands of the average standard of factitious refinements, in social intercourse, he is less in fault, often, than the framers of such senseless dogmas as disgust rather than edify. But if he makes a brute of himself, either by drink or passion, he becomes an unfit companion of sober men, and may properly be required not to come among them.²² If the carrier improperly exclude the husband from table, and the wife prefers on that account to take her meals with her husband, it will be regarded as an improper exclusion of both, and the carrier responsible accordingly.²²

§ 337. It seems that carriers are responsible for damages occurring to goods by reason of being stowed on deck in tempestuous weather, unless such stowage be authorized by

²¹ *Young v. Fewson*, 8 C. & P. 55.

²² *Pendergrast v. Compton*, 8 Car. & P. 454.

custom or the consent of the shipper.²³ And so also, where the carrier improperly stows the goods on deck, whereby a portion of them is lost, he cannot recover for the freight of the remainder, provided the portion lost was of greater value than the freight due.²⁴ But if the carrier is not in fault in regard to stowage of goods on deck, that being done by the consent or express contract of the owner of the goods, he cannot be compelled to contribute for the jettison of the goods.²⁵ But where the goods are laden upon deck, according to the custom of a particular trade, the owner of the ship is held responsible for contribution to the owner of the goods, for their loss.²⁶ So, where goods are thrown overboard in order to save the ship and the remainder of the cargo, and that is effected, it is equitable and in conformity with the rules of law, that both the ship and the cargo thus saved, should contribute to the loss on the basis of general average.²⁷ And where goods of a particular description are, in conformity with a notorious custom, stowed in a particular way, shippers who consider such mode of storage hazardous, must notify carriers of their desire to have a different one adopted, or they will not be entitled to charge the carrier with damages received in consequence of it.²⁸

§ 338. If the carrier, in consequence of non-compliance with the regulations of the port, expose the goods to for-

²³ *Barber v. Brace*, 3 Conn. 9; *Smith v. Wright*, 1 Caines, 43.

²⁴ *Waring v. Morse*, 7 Alab. 343.

²⁵ *Dodge v. Bartol*, 5 Greenl. 286.

²⁶ *Gould v. Oliver*, 4 Bing. (N. C.) 134.

²⁷ *Rossiter v. Chester*, 1 Doug. (Mich.) 154. This rule of the maritime law, as enforceable in the courts of admiralty, is here fully recognized; but on the ground that the case occurred upon the lakes, where at that time the admiralty jurisdiction did not obtain (although it is otherwise now, by act of Congress), it was held the claim was not enforceable in the courts of common law. See also *Lawrence v. Minturn*, 17 How. (U. S.) 100, where the general subject of the liability of other parties and interests to contribute to a necessary loss by jettison is thoroughly discussed, and the authorities learnedly and extensively commented on.

²⁸ *Baxter v. Leland*, 1 Abbott's Adm. 348.

feiture, he thereby becomes responsible to the owners. It is the duty of the carrier, and his servants and agents, in making delivery at the port of destination, to learn the laws and regulations there in force, and make the delivery in conformity therewith, so as not only to land the goods, but to do it in such a legal manner as to place them within the power of the consignees.²⁹

§ 339. The following case is of sufficient importance to justify stating at length. Although a common carrier of passengers at sea, as the master of a steamship, may properly refuse a passage to a person who has been forcibly expelled by the actual, though violent and revolutionary authorities of a town, under threat of death if he return, and when the bringing back and landing of such passenger would, in the opinion of such master, tend to promote further difficulty, yet such refusal should precede the sailing of the ship. If the passenger have violated no inflexible rule of the ship in getting on board the vessel, have paid or tendered through himself or a friend, the passage money, and have conducted himself properly during the voyage, the master has no right, as matter of law, to stop a returning vessel, put him on board of it, and send him back to the port of departure. And if he do so, damages will be awarded against him on proceedings in admiralty. However, where a person who had been thus banished from a place, got on board a vessel going back to it, determined to defy the authorities there and take his chance of life, and the captain, who had not known the circumstances of the case until after getting to sea, on meeting a return steamer of the line to which his own vessel belonged, stopped his own and sent the man on board the returning vessel to be taken back to the place of departure, such captain, not acting from any malice, but from a humane motive, and under the belief that the passenger would be hanged if landed at the port to which his own vessel was going, in

²⁹ *Howland v. Greenway*, 22 How. (U. S.) 491.

such a case, the apprehended danger mitigates the act, and the damages must be small. Accordingly, the Supreme Court, on appeal from a decree giving the plaintiff four thousand dollars, modified it by directing that the damages must be reduced to fifty dollars, and moreover ordered that each party should pay his own costs on the appeal. In such a case a passenger is entitled to compensation for the injury done him by being put on board the returning vessel, so far as that injury arose from the act of the captain of the other vessel in putting him there. But he is not entitled to damages for injuries from obstructions which he afterwards met in going to the place from which he had been expelled, and to which he desired to return; and which injuries were not caused by the act of this captain, but were owing to the fact that all to whom he afterwards applied for passage to that place, were aware of the power and determination of the authorities there, and therefore refused to carry him back.³⁰

³⁰ *Pearson v. Duane*, 4 Wall. (U. S.) 605.

PART III.



COMMON CARRIERS OF PASSENGERS.



PART III.

COMMON CARRIERS OF PASSENGERS.

CHAPTER I.

DEGREE OF CARE REQUIRED.

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| § 340. <i>Are responsible for the utmost care and watchfulness.</i> | §§ 349, 350, and notes. <i>Further discussion of the rule and the cases.</i> |
| § 341. <i>Duty extends to everything connected with the transportation.</i> | § 351. <i>Duty to inform passengers of peril requiring caution to escape.</i> |
| § 342. <i>But will not extend to an insurance of safety.</i> | § 352. <i>Person purchasing a ticket becomes a passenger, and is entitled to protection on reaching his seat in the carriages.</i> |
| § 343. <i>Will make no difference, if passenger does not pay fare.</i> | § 353. <i>Passenger carriers bound to exclude disorderly persons from their carriages.</i> |
| § 344. <i>So too where the train is hired for an excursion, or is under control of state officers.</i> | § 354. <i>Company bound to fence its stations so as to hinder passengers entering by a dangerous way.</i> |
| § 345. <i>Not easy to define the degree of care required.</i> | § 355. <i>A passenger carrier who attempts to carry ordinary passengers and soldiers at the same time, is responsible for the consequences.</i> |
| § 346. <i>Passenger carriers not responsible for accidents without fault.</i> | |
| § 347. <i>They contract only for their own acts.</i> | |
| § 348. <i>They must adopt every precaution in known use.</i> | |

§ 340. It is agreed on all hands that carriers of passengers are only liable for negligence, either proximate or remote, and that they are not insurers of the safety of their passengers, as they are as common carriers of goods and of the baggage of passengers. The rule is clearly laid down in one of the early cases,¹ by *Eyre*, Ch. J., that carriers of passengers “are not liable for injuries happening to passengers from unforeseen accident or misfortune, where there has been *no* negligence or default in the driver.” “It is said he was driving with reins so loose that

¹ *Aston v. Heaven*, 2 Esp. 533; *S. P. Frink v. Potter*, 17 Illinois, 496. See also, *Munroe v. Leach*, 7 Met. 274.

he could not readily command his horses; if that was the case the defendants are liable; for a driver is answerable for the *smallest negligence*." This is now the settled rule upon the subject, as applicable to all modes of carrying passengers, by those who hold themselves out as public or common carriers of passengers.²

§ 341. And the obligation of care and watchfulness extends to all the apparatus by which passengers are conveyed.³ In this last case it is said: "The obligation of a stage proprietor, in regard to carrying passengers safely, has reference to the team, the load, the state of the road, as well as the manner of driving." In another case the rule is somewhat more elaborated,⁴ by *Best*, Ch. J.: "The action cannot be maintained unless negligence be proved, and whether it be proved is for the determination of the jury. The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also with lights by night. *If there be the least failure in one of these things* the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." The rule of care and diligence thus laid down has been very generally adopted in this country.⁵ The fact that injury was suffered

² *Christie v. Greggs*, 2 Camp. 79; *Harris v. Costar*, 1 C. & P. 636; *White v. Boulton*, Peake's C. 81; *Sharp v. Gray*, 9 Bing. 457. Passenger carriers owe a higher degree of diligence and watchfulness toward passengers than toward strangers. *State v. Baltimore & Ohio Railw.*, *post*, chap. xix.

³ *Taylor v. Day*, 16 Vt. 566; *Curtis v. Drinkwater*, 2 B. & Ad. 169. See *Sales v. Western Stage Co.*, 4 Clarke (Iowa), 541.

⁴ *Crofts v. Waterhouse*, 3 Bing. 319. A very similar rule is adopted in *Farrish v. Reigle*, 11 Gratt. 697. The defect in this case was the blocks being out of the brakes, which caused the coach to press upon the horses so that they could not control it, and in consequence it was upset and the plaintiff injured.

The coach-owner, or his servants, must examine his coach before each trip, or he is chargeable with negligence if any accident happen through defect of the coach. And if any irregularity is pointed out, the driver must look to it immediately. *Brenner v. Williams*, 1 C. & P. 414, *Best*, Ch. J.

⁵ *Boyce v. Anderson*, 2 Pet. (U. S.) 150; *Stokes v. Saltonstall*, 13 Pet. (U. S.)

by any one while upon the company's trains as a passenger, is regarded as *prima facie* evidence of their liability.⁶

181, 192; *Fuller v. Naugatuck Railw.*, 21 Conn. 557; *Hall v. Conn. Riv. Steamboat Co.*, 13 Conn. 319; *Camden & Amboy Railw. v. Burke*, 13 Wend. 611, 626; *McKinney v. Neil*, 1 McLean, 540; *Maury v. Talmadge*, 2 McLean, 157; *Stockton v. Frey*, 4 Gill, 406; *Hollister v. Nowlen*, 19 Wend. 236; *Derwort v. Loomer*, 21 Conn. 245. But a passenger carrier is not responsible for any loss or expense of the passengers consequent upon quarantine regulations. *New Orleans v. Windermere*, 12 La. Ann. 84. See *Alden v. N. Y. Central Railw.*, 26 N. Y. 102, where the company were held liable for an injury resulting from a crack in the axle of a car, undiscoverable by any practicable mode of examination.

The rule in Connecticut was first settled, in 13 Conn. 326, that carriers of passengers are "bound to the highest degree of care that a reasonable man would use." This has been adhered to in all the subsequent cases, and is substantially the same as the English rule, and as that adopted in the other States, and in the United States Supreme Court, 13 Pet. (U. S.) 190, where Mr. Justice *Barbour* indorses the charge of the Circuit Court, that the carrier of passengers is liable "if the disaster was occasioned by the least negligence, or want of skill or prudence, on his part."

But in the case of *Boyce v. Anderson*, 2 Pet. (U. S.) 150, Mr. Ch. Justice *Marshall* lays down the rule of care, in such cases, as that of ordinary care, — the care which all bailees for hire owe the employer. The court, in 13 Pet. 192, attempt to escape from this rule, upon the ground that the remarks of Ch. Justice *Marshall*, in the former case, had reference exclusively to the carriage of slaves, and that the rule laid down would not of necessity apply to ordinary passengers. But

⁶ *Denman*, Ch. J., at Nisi Prius, in *Carpue v. London & B. Railw.*, 5 Q. B. 747. *Laing v. Colder*, 8 Penn. St. 479, 483; *Galena & Chicago Railw. v. Yarwood*, 15 Ill. 468, 471; *Hegeman v. Western Railw.*, 16 Barb. 353, 356; *Holbrook v. Utica & Schen. Railw.*, 16 Barb. 113; *Curtis v. Rochester & Syracuse Railw.* 20 Barb. 282.

The same rule had obtained in actions against carriers of passengers by coaches. 13 Pet. (U. S.) 181. See *Skinner v. L. B. & South Coast Railw.*, 5 Exch. 787, 2 Eng. L. & Eq. 360, to same effect.

But in *Holbrook & Wife v. Utica & Schen. Railw.*, 2 Kernan, 236, the court seem to deny that a presumption of negligence arises in all cases of injury to passengers. In this case the wife's arm, while in the window of the car, was broken by something coming in contact with the car in passing stationary carriages of the company on another track. The court say, in cases of this kind, the burden of showing negligence is upon plaintiff, and the presumption is an inference of fact for the jury, from the cause of the injury and the circumstances attending.

The case of *Hegeman v. Western Railw.*, 16 Barb. 353, was where the plaintiff had sustained an injury by the breaking of an axle-tree while he was a passenger in defendants' cars, and it was claimed to be neglect in the company in not providing safety-beams to their cars, and it was held, that evidence might be received to show the utility of the invention, and that it was proper to submit the question of negligence to the jury under proper instructions. The court say :

§ 342. So, too, evidence that the cars did not stop at a way station the usual time, and that a passenger is injured

it is observable that the learned chief justice makes no such distinction, and also, that the nearer the thing transported comes to the condition of property merely, the higher the degree of care and responsibility, so that the argument seems not only to fail, but to produce a reflex influence.

We refer to this subject here, not with any view to go into the question of the real coincidence of the degree of care of carriers of passengers and that of ordinary bailees for hire, but merely to state that it seems to us the cases really come up to nothing more than that which is required of every bailee for hire, that he should conduct the business as prudent men would be expected to conduct their own business of equal importance. And if the business be of the highest moment, then the care, skill, and diligence should be also of the most extreme character. See also *Fletcher v. Boston & Maine Railw.*, 1 Allen, 9; *Holley v. Boston Gas Light Co.*, 8 Gray, 131.

If the degree of care and watchfulness is to be in proportion to the importance of the business, and the degree of peril incurred, it is scarcely possible to express the extreme severity of care and diligence which should be required in the conduct of passenger trains upon railways. Hence very few cases of accident and injury have occurred, where it was not considered in some measure attributable to a want of the requisite degree of care. We here refer to the case of *Briggs v. Taylor*, 28 Vt. 180, 184, for a more full exposition of this general subject of the degrees of care and diligence. The rule is here thus stated:—

In regard to the carriage, and the wagons and sleds, which were not past

“Whether the engine or car, which is placed upon the road for the purpose of carrying passengers, has been manufactured at its own shops,” . . . or purchased of other manufacturers, “the company is alike bound to see, that in the construction no care or skill has been omitted for the purpose of making such engine or car as safe as care and skill can make it.” It was held to afford no presumption against the negligence of the company, that they had selected their servants with care with reference to their competency, or that the act, by which the plaintiff sustained injury, was done without the sanction of the company. *Gillenwater v. Madison & Indianapolis Railw.*, 5 Ind. 340; *Farish v. Reigle*, 11 Gratt. 697. And in a late case (*Alden v. N. Y. Central Railw.*, *Am. Railw. Times*, Feb. 4, 1865,) it is reported that the court held the company responsible for a defect in the axle-tree of a car, which was not discoverable without taking the car to pieces, a passenger being injured in consequence.

In *Galena & Chicago Railw. v. Yarwood*, 17 Ill. 509; s. c., 15 Ill. 468, it is held, that a passenger in a railway car need only show that he has received an injury, to make a *primâ facie* case against the carrier; the carrier must rebut the presumption, in order to exonerate himself. Negligence is a question of fact, which the jury must pass upon. Persons in positions of great peril are not required to exercise all the presence of mind and care of a prudent, careful man, under ordinary circumstances; the law makes allowance for them, and leaves the circumstances of their conduct to the jury. See *Albright v. Penn*, 14 Texas, 290.

In *Frink v. Potter*, 17 Ill. 406, it was held, the proprietor of a stage-coach is

in getting out, is good evidence against the company in an action to recover for the injury.⁷ In an action for dam-

use, although the carriage was an old one, and the wagons and sleds were described by the witnesses as being "not very new nor very old," it seems to us there was no testimony in the case tending to show that an officer who held them under attachment, would be fully justified in letting them stand outdoors all winter. We could scarcely conceive of a state of facts justifying such a course short of absolute necessity, which, it would seem, would never occur when boards could be obtained. And where there is no testimony tending to excuse an officer in such case, it becomes a mere question of damages. Questions of negligence are said in the books to be mixed questions of law and fact, but where there is no testimony tending to show negligence, or where a given course of conduct is admitted which results in detriment, and no excuse is given, the liability follows as matter of law, and there is nothing but a question of damages for the jury.

We do not think a judge is ever bound to submit to a jury questions of fact resulting uniformly and inevitably from the course of nature, as that carriages will be injured more or less by exposure to the weather during the whole winter, or that a judge is bound to submit to a jury the propriety of such a course, when it is perfectly notorious that all prudent men conduct their own affairs differently. This uniformity of the course of nature or the conduct of business becomes a rule

liable for an injury to a passenger, which resulted from the breaking of an axle-tree by the effect of frost. If the carrier knew, or might have known, by the exercise of extraordinary care and attention, that danger would result from using a coach in the manner and under the circumstances, and the danger could have been avoided, he is liable.

And if such danger exists as cannot be avoided, and so imminent as to deter prudent men from encountering it in their own business, the carrier should, it would seem, refuse to proceed, or he will be liable for the consequences. Passengers should not be pushed into inevitable danger, without being consulted. But if, being informed, they choose to incur the hazard, probably it should be regarded as their own misfortune if they suffer damage in spite of the best efforts of the carrier and his servants.

In *Laing v. Colder*, 8 Penn. St. 483, it was held, that where passengers in a railway car are liable to have their arms caught in passing bridges if lying out of the windows, it is the duty of the conductors of the train to give such notice to them as will put them effectually on their guard, or the company are liable for all such injuries, and that it is not sufficient to trust to printed notices put up in the

⁷ *Fuller & Wife v. Naugatuck Railw.*, 21 Conn. 557. It is said in *Southern Railw. v. Kendrick*, 40 Miss. 374, that it is the duty of passenger carriers, by railway, to carry safely to the place of destination, to announce audibly in each car the station, and then to allow sufficient time for the passengers safely to leave the carriages; and that it is the duty of the passengers to use reasonable care; and to conform to the usages and customs of the company, and of that mode of transportation, as far as known and understood by them.

ages sustained by a passenger on a railway, by the breaking down of a bridge, it is no excuse that the bridge was

of law. But while there is any uncertainty it remains matter of fact for the consideration of a jury. It could not be claimed that it should be submitted to a jury whether cattle should be fed or allowed to drink, or cows be milked.

As from the determination of the first point a new trial becomes necessary, it will be of some importance to inquire in regard to the proper mode of defining the duty of the officer in keeping goods attached on *mesne* process. It is usually defined in practice in this State, certainly, so far as we know, much as it was in this case, by the use of the terms "ordinary and common care, diligence, and prudence." And it is probable enough these terms might not always mislead a jury. But it seems to us they are somewhat calculated to do so. If the object be to express the medium of care and prudence among men, it is certain these terms do not signify a fixed quality of mediocrity even. For if so, they would not be susceptible of the degrees of comparison, as more ordinary, and most ordinary, which medium, and middle, and mean, are not. The truth is, that "ordinary," and "middling," and "mediocrity," even, when applied to character, do import to the mass of men, certainly, a very subordinate quality or degree; something quite below that which we desire in an agent or servant, and which we have the right to require in a public servant especially. A man who is said to be middling careful, or ordinarily careful, is understood to be careless, and is sure never to be trusted.

We have been at some pains to look into the English books upon this point,

cars. But in regard to such perils as ordinarily attend railway travelling, and which must be apparent to all passengers of common experience, like passing from car to car, or standing upon the platforms, when the train is in motion, it is probable that general notice would be sufficient, and a passenger, who voluntarily exposes himself to extraordinary peril, having no necessity or excuse for doing so, should not be allowed to recover for damage thereby accruing. But if he have a necessity for doing so, and damage accrue in consequence of the negligent conduct of the train, he ought not, perhaps, to be precluded from a recovery.

See also *Christie v. Griggs*, 2 Camp. 79; *Ware v. Gay*, 11 Pick. 106; *Stockton v. Frey*, 4 Gill, 406; *Nashville & Chat. Railw. v. Messino*, 1 Sneed, 221.

In 3 Kernan, 9, the case of *Hegeman v. Western Railw.*, is affirmed by the Court of Appeals, and the proposition in regard to the liability of the company for defects in their cars being the same, whether they manufacture them or purchase them of others, which is extracted from the opinion of the Supreme Court above, is distinctly reaffirmed by the Court of Appeals. *Denio, J.*, dissenting.

The Court of Appeals recognize the rule of care and diligence, to which we have before alluded, that its extent is to be measured by the known perils to which passengers are exposed, and that something more is required in railway transportation than in carrying passengers by coaches.

Gardiner, Ch. J., says: "That although the defect was latent, and could not be discovered by the most vigilant external examination, yet if it could be ascer-

built by a competent engineer.⁸ But it seems to have been doubted by the court in this case, whether the com-

and although there may be some exceptions, the general rule certainly is, among the English judges, to express common care and ordinary care by terms less liable to misconstruction, and, as we think, likely to be more justly appreciated by juries. In *Duff v. Budd*, 3 Brod. & Bing. 177, the rule is laid down by *Dallas*, Ch. J., to the jury in these words: "Gross negligence is where the defendant or his servants have not taken the same care of the property as a *prudent man would have taken of his own*," and the judgment is affirmed by the full bench. In *Riley v. Horne*, 5 Bing. 297, *Best*, Ch. J., says of a carrier, "the notice will protect him unless the jury think that *no prudent person*, having the care of an important concern of his own, would have conducted himself with so much inattention, or want of prudence." In *Batson v. Donovan*, 4 Barn. & Ald. 32, the same learned judge lays down the rule thus: "They must take the same care of it that a *prudent man* does of his own property. This is the law with respect to all bailees for hire or reward."

In *Wyld v. Pickford*, 8 M. & W. 443, *Parke*, B., seems to claim a distinction between gross negligence and ordinary neglect, but admits that ordinary neglect may be correctly defined in the above cases. But in *Hunter v. Debbin*, 2 Queen's B. 646, *Denman*, Ch. J., said, in regard to gross negligence, "It might have been reasonably expected that something like a definite meaning should have been given to the expression"; "in none of the numerous cases referred to on the subject is any such attempt made, and it may well be doubted

tained by a known test, applied either by the manufacturer or the defendant, the latter is responsible."

And in *Curtiss v. Rochester & Syracuse Railw.*, 20 Barb. 282, where the injury occurred from a misplacement of the rails, a collision being caused thereby, it was held the company were bound to see that the rails were in the right position, and not to trust exclusively to the lever of the switch, when the rails were in open view, while moving it, and also to see that the rails were firmly secured, and for want of these things they were guilty of negligence; that evidence that the switch was placed right did not rebut all presumption of negligence; that it was a question for the jury, under all the facts and circumstances.

So also the company were held liable where the injury occurred from coming in contact with an animal upon the track, which might have been seen early enough to stop the train, and where the train was moving at an unreasonable rate of speed, and no signal given, or effort made to arrest the speed. *N. & C. Railw. v. Messino*, 1 Sneed, 220. And where a passenger in an omnibus was injured by the bursting of a lamp, it was held to be incumbent upon the carrier to show by affirmative proof that the fluid used in the lamp was a safe and proper article for such uses. *Wilkie v. Butler*, 3 E. D. Smith, 327. The fact of an animal being upon the track is *primâ facie* evidence of negligence in the company, they being bound as between themselves and their passengers to keep the road free from all obstructions of that character. *Sullivan v. Philadelphia & Reading*

⁸ *Grote v. Chester & Holyhead Railw.*, 2 Exch. 251.

pany could have been chargeable with any fault, if they had adopted the best mode of constructing the bridge, whether between 'gross negligence' and negligence merely, any intelligible distinction exists."

But the English cases all seem to agree in defining ordinary negligence as that which a *prudent man* does not allow in the conduct of his own affairs, and most of the later cases, where the question has arisen, both English and American repudiate the old attempt to distinguish three distinct degrees of diligence and the correlative degrees of negligence. In *Wilson v. Brett*, 11 M. & W. 113, Baron *Rolfe* makes some very pertinent remarks upon this subject: "I said I could see no difference between negligence and gross negligence, that it was the same thing, with the addition of a vituperative epithet." And in *Austin v. Manchester Railw.*, 10 C. B. 454; s. c., 11 Eng. L. & Eq. 513, *Cresswell, J.*, refers to the language of Lord *Denman* quoted above, with approbation, and in the steamboat *New World v. King*, 16 How. (U. S.), 469, 474, Mr. Justice *Curtis* seems to adopt a similar view in regard to these distinctions being more or less unintelligible, and in practice often leading to misconstruction and misunderstanding. It seems, too, that these distinctions are repudiated by many of the continental jurists in Europe as producing more uncertainty than they cure; 6 *Toullier's Droit Civile*, 239, 11; id. 203; and although it seems we have adopted these distinctions in the degrees of diligence and negligence from the Roman civil law, I do not find the commentators on that law adopting our loose manner of expressing what is required of a bailee for hire. Domat, part 1, book 1, tit. iv. sec. viii. art. iii., thus expresses the care of such bailees: "He who undertakes to keep cattle, ought to preserve that which is intrusted with all the care that is possible to be taken by persons who are the most watchful and diligent." And this is really synonymous with the rule adopted by the English courts. Mr. Justice *Story* (Bailments, § 11), in order to maintain the old definition of three grades of diligence, defines it much in the manner it was done in the present case: "Common or ordinary diligence is that degree of diligence which men in general exert in respect to their own concerns," which certainly leaves upon the mind a different impression from the definition of Domat and the English judges, but we cannot but regard it as one calculated to mislead juries; and this very writer, in § 13, adopts the diligence of "prudent men" as the

Railw., 30 Penn. St. 234; *post*, pt. iii., ch. xiv., n. 1. But in *Curtis v. Rochester & Syracuse Railw.*, 18 N. Y. 534, it is said that no *prima facie* presumption of negligence in the carrier results from the injury merely, but only when it appears that it resulted from some defect in the road or equipment.

Where the company give notice under the statute that they will not hold themselves responsible for injury to passengers caused while standing on the platforms, such notice being posted up in the cars, it affords no ground to presume that the company waived the notice because the conductor did not warn the passenger to leave the platform. *Higgins v. New York & Harlem Railw.*, 2 Bosw. 132. See also *Chicago, Burlington, & Quincy Railw. v. George*, 19 Ill. 510. The fact that a train was running several hours out of time, is presumptive evidence of gross negligence. *Ib.*

and the best materials, under the supervision of a competent engineer. This seems to be stating a case where the

measure of common diligence, and it seems to us nothing short of this will do justice in a case like the present.

It may with some plausibility be said, that one who employs a man known to the employer to be habitually indifferent to the management of his own concerns, has no right to expect him all at once, even for reward, to assume a wholly different character; and the jury would be likely so to decide, the question being ordinarily one of fact, when the testimony raises any doubt; and when one employs a man of skill and talent in the management of his own affairs, he may justly expect him to exert the same skill and talent to the same extent in the management of the business which he undertakes for others; and in the case of a public officer, who is selected for his fitness for the particular trust, every one may justly expect all the care and diligence which men entirely competent and careful could reasonably be expected to exert in their own business of equal importance.

The absurdity of this measure of duty in a public officer will become sufficiently obvious if we advert to the form of the oath, or of the official bond of public officers. What should we think of having one sworn or giving bond to perform his duty as common men ordinarily do such things. This certainly sounds very different from the official oath, "that you will faithfully execute the office to the best of your judgment and ability," and an official bond obliges officers to the strictest, most faithful performance of all their duties. Any other standard would sound absurd, and it is obvious to us, that the case of *Bridges v. Perry*, 14 Vt. 262, was not intended to impose any different rule of liability upon officers in keeping property. As said in *Drake on Att. § 273*: "The officer must comply with all the requisitions of the law" (one of which is to keep safely property attached on *mesne* process, and restore it when required by law), "or show some legal excuse for not doing so." Hence in *Sewall v. Matton*, 9 Mass. 535, an officer was held bound to keep property attached on *mesne* process five years before, ready for sale on the execution, and in *Tyler v. Ulmer*, 12 Mass. 163, it was held an officer could not in such case excuse himself for not producing cattle, by showing that from the scarcity of fodder they could not have been kept alive.

Any injury or loss in such cases renders the officer *prima facie* liable, and imposes upon him the burden of showing some valid excuse. *Logan v. Matthews*, 6 Penn. St. 417; *Story on Bail*, 411; *Bush v. Miller*, 13 Barb., 482. There is undoubtedly some contradiction in the cases in regard to the burden of proof of negligence in the ordinary case of bailments for hire, but there can be no doubt, we think, in regard to the question in the present case. This is expressly so laid down in *Bridges v. Perry*. The court in that case, as will be obvious from a careful examination, had no purpose of excusing this class of officers from any degree of care and diligence which careful men would expect under the circumstances.

And this, it seems to us, is the true measure of liability in all cases of bailment. The bailee is bound to that degree of diligence which the manner and the nature of his employment makes it reasonable to expect of him; anything less than this is culpable in him, and renders him liable. The conduct of men in general

bridge could not have fallen but by an earthquake or some convulsion of nature, for which the company are in

in the region where the attachment was made, may be some guide to what ought to be required of the defendant in keeping property attached. We mean, of course, prudent and careful men, for no one is expected to go very essentially beyond the common custom of the country in such matters, as it must be attended with extraordinary expense, and a question might thereby arise as to the propriety of incurring such expense.

But see *Hood v. N. Y. & N. H. Railw.*, 22 Conn. 1, 15; *Galena & Chicago Railw. v. Yarwood*, 15 Ill. 468; *Philadelphia & Reading Railw. v. Derby*, 14 How. (U. S.) Sup. Ct. 468; *Railroad Co. v. Aspell*, 23 Penn. St. 147, 149; *N. J. Railw. Co. v. Kennard*, 21 Penn. St. 203; *McElroy v. Nashua & Lowell Railw. Co.*, 4 Cush. 400; 16 Barb. 356.

In *Caldwell v. Murphy*, 1 Duer, 241, the court say: "The charge of the judge, that the law exacted from a carrier of passengers extraordinary care and diligence, and that they are liable unless the injury arises from force or pure accident, was entirely correct." And in *Ingalls v. Bills*, 9 Met. 1, the same rule is adopted. The injury here occurred from the breaking of the axle-tree of the coach, through a flaw in the iron not visible from the outside, and the defendant had been at great care and expense, in procuring a coach of the best materials and workmanship, as he supposed; and the court say, that carriers of passengers are "bound to use the *utmost care and diligence* in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against; and if accident happens through defect in the coach, which might have been discovered and remedied upon the most thorough and careful examination of the coach, the owner is liable. But if the injury arise from some invisible defect which no ordinary test will disclose, like that in the present case, the carrier is not liable." *Frink v. Potter*, 17 Ill. 406; *Galena & Chicago Railw. v. Fay*, 16 Ill. 558. See also *Wilkie v. Bolster*, 3 E. D. Smith, 327.

And in a recent English case, *Manser v. Eastern Counties Railw.*, 3 Law T. (N. S.) 585, Exch., where the accident occurred from the breaking of the tire of a driving-wheel, where the defect could not be discovered by the original test, but where it might have been, if it had been repeated when the tire was returned, after being considerably worn, the company were held liable.

Slaves are to be regarded as passengers, and carriers only liable for negligence in carrying them. *McClenaghan v. Brock*, 5 Rich. 17.

But a railway company, who take on their trains a slave, and transport him for the usual fare for negroes, such slave having only a general pass, or permit, when the law of the State requires such permit to specify the length of time the slave is to be absent, and the places he is to visit, this being done without the knowledge of the owner of the slave, are liable for a conversion of the slave and for all the injuries received by such slave in consequence of such transportation, whether occurring from the negligence of the company, or not. *Macon & Western Railw. v. Holt*, 8 Georgia, 157. See also upon the general subject of this note, *Black v. Carrollton Railw.*, 10 Louisa. Ann. 33.

no sense liable. Where the track of a railway was carried over an embankment of loose sand, likely to be washed away by water, and where the culverts were insufficient to carry off the water, but it not being shown that the embankment had been washed away before, or that the water had ever come up to it, and it being shown, that after the continuance of a very extraordinary storm for a long time, an express train, passing at the usual rate, had been thrown from the rails, and the plaintiff in consequence being injured, it was held, that there was slight or no evidence of negligence on the part of the company, and a verdict for £1500 in favor of the plaintiff was set aside as being against evidence.⁹ The bed of the roads had in fact become undermined, and the sleepers were unsupported in consequence of the rush of water and the carrying off a bridge above the embankment, it being about midnight at the time the accident occurred, but no evidence to show that the servants in charge of the train were aware of the bad condition of the track, or that the water had come up to the embankment. Water was seen, but not upon the line. The court seemed to think the company not bound to build their track so as to withstand such extraordinary floods. But it certainly deserves consideration whether there is not rashness in driving an express train at the usual rate of speed under such perilous circumstances. We should not expect a jury to hesitate much upon a question of that character.

§ 343. The liabilities of the company attach, although the passenger was riding upon a free ticket as a newspaper reporter.¹⁰ But it has been sometimes claimed to

⁹ Withers v. North Kent Railw., 3 H. & N. 969.

¹⁰ Hodges on Railw., 621; Great Northern Railw. v. Harrison, 12 C. B. 576; s. c. 26 Eng. L. & Eq. 443; Gillenwater v. Madison & Indianapolis Railw., 5 Ind. 340. And in *Nolton v. Western Railw.*, 15 N. Y. 444, it is held that where a railway voluntarily undertakes to convey a passenger upon their road, whether with or without compensation, if such passenger be injured by the culpable negligence or want of skill of the agents of the company, they are liable, in the absence

admit of some question, whether such passenger could always exact the same degree of care and watchfulness as one who paid fare, especially where his ticket, as is not unusual in such cases, contained a notice that passengers who used such ticket rode at their own risk, and the company would not be responsible for the safety of such passengers or their baggage. But the subject is very much discussed in one very important case,¹¹ in the national

of an express contract exempting them. The point of the degree of care requisite in such cases is here discussed, but not decided. But the argument is in favor of that for which we contend, that the care, diligence, and skill required in any particular business, is determined by the difficulty and peril of the business, rather than by the consideration of the undertaking. This is the same case of a mail agent, who was carried as an accessory of the mail referred to in 2 Redf. Railw., § 251, pl. 5. And, although the court seem to regard it as a case of gratuitous transportation, it seems to us it should not so be considered. We should certainly hold it a carrying for compensation by the contract, although nothing in particular was paid for the fare of the agent as such. An agreement upon a free pass, that the person accepting it assumes all risk of personal injury and loss or damage to property whilst using the trains of the company, "does not exempt the company from liability for gross negligence." *Indiana Central Railw. v. Mundy*, 21 Ind. 48. See *Ohio & Miss. Railw. v. Muhling*, 30 Ill. 9, where it is held that the responsibility of a railroad company for the safety of its passengers does not depend on the kind of cars in which they are carried, nor on the fact of payment of fare by the passenger. But see *Bissell v. N. Y. Central Railw.*, 25 N. Y. 442, where a contract with a cattle-dealer, providing that "persons riding free to take charge of their own stock, do so at their own risk of personal injury for whatever cause," is held binding. In every case where one takes passage with a common carrier of passengers, there is, in the absence of special contract, one implied for safe transportation and for fare. *Frink v. Schroyer*, 18 Ill. 416.

¹¹ *Phil. & Read. Railw. v. Derby*, 14 How. (U. S.) 483. The principle of this case has been followed, in an elaborate opinion of Mr. Justice *Curtis*, *Steamboat New World v. King*, 16 How. (U. S.) 469, 474, where the old theory of different degrees of negligence, defined by the terms, slight, ordinary, and gross, is examined and dissented from. The true theory seems to be, that it makes no difference, whether a service is performed gratuitously or not, in regard to the obligation to perform it well, after it is once entered upon. But it depends chiefly upon the circumstances of the case, and the undertaking of the party. If one is permitted to ride in the company's carriages as a passenger, he is certainly entitled to demand, and to expect the same immunity from peril, whether he pay for his seat or not. The undertaking to carry safely is upon sufficient consideration if once entered upon,*as was held in the familiar case of *Coggs v. Bernard*, Holt, 13.

But if the party should obtain consent to ride in some unusual mode, for his own special accommodation, he is then only entitled to expect such security as the mode of conveyance might reasonably be expected to afford.

tribunal of last resort, where the plaintiff, being president of another railway, was at the time riding by invitation of the president of defendants' road, in a special train for the accommodation of the officers of the road, and without charge. The collision occurred by another engine and tender coming in the opposite direction upon the same track, in disobedience of orders to keep the track clear. *Grier, J.*, said: "The confidence induced, by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it. Where carriers undertake to carry persons by the powerful but dangerous agent of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary, or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of gross." But where one accepts and uses a free ticket, having an express condition printed thereon whereby the holder "assumes all risk of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss of or injury to property," and the passenger is injured by means of a collision between the passenger train and a freight train left standing upon the track, the company is not responsible.¹² Railway companies may stipulate for exemption from all responsibility for losses accruing to passengers from the negligence of their agents and servants, unless it arise from fraudulent, willful, or reckless misconduct on the part of some one employed by the company.¹² Where the injury arose from the gross neglect of the agents and servants of the company, it was held

¹² *Welles v. New York Central Railw.*, 26 Barb. 641. Gross negligence is here defined to be such as implies fraud or bad faith.

not to come fairly within the risk assumed by the passenger.¹³

§ 344. Hiring a train for an excursion does not excuse the company from liability to the passengers for injuries caused by their servants.¹⁴ Or, if the train is under the control of state officers, it will not exonerate the company, or a natural person, if they continue to act as passenger carriers under the State.¹⁵

§ 345. Since the publication of the second edition we have had occasion to observe that the profession do not always readily comprehend, or if they do, fail clearly to state, the precise distinction which we have attempted to define between the degree of responsibility assumed by carriers of goods and the carriers of passengers.

§ 346. It seems to be supposed by some, that when it is said that the "utmost" care and diligence is required of carriers of passengers, that if any accident befalls the train upon which they are being transported, which might have been prevented by any degree of human skill or diligence, the carrier is liable for all damages accruing to the passengers. In short, that the carrier assumes all risks of accidental or providential occurrences, provided such contingencies might have been resisted or warded off by any degree of knowledge or activity within the power of man. The result of such a rule will be to render the carrier responsible for all contingencies not absolutely arising from irresistible force, or what is called the *vis major*, such as tempests and hurricanes and the public enemy. And this, as we have before shown, brings the rule to the same point which defines the responsibility of carriers of goods.¹⁶

¹³ Bissell v. N. Y. Central Railw., 29 Barb. 602; Illinois Central Railw. v. Read, 37 Ill. 484.

¹⁴ Skinner v. L. B. & S. Railw., 5 Exch. 787; s. c., 2 Eng. L. & Eq. 360; Cleveland, Co., & Cin. Railw. v. Terry, 8 Ohio (N. S.) 570. But see Peoria Br. Ass. v. Loomis, 20 Ill. 235.

¹⁵ Peters v. Rylands, 20 Penn. St. 497.

¹⁶ Ante, pt. ii., ch. ii.

§ 347. The carriers of passengers only contract for their own acts, and for such a degree of watchfulness and diligence as is practicable, short of incurring an expense which would render it altogether impossible to continue the business. Thus it was said, in a recent case,¹⁷ that "the care and diligence to be used by both parties are to be measured by the known perils to which passengers are exposed by the particular kind of conveyance used." And in another case in the same State¹⁸ it is said: "While courts, in announcing the rule governing common carriers of persons, have said, that they must be held to the utmost degree of care, vigilance, and precaution, it must be understood that the rule does not require such a degree of vigilance as will be wholly inconsistent with the mode of conveyance adopted and render it impracticable. Nor does it require the utmost degree of care which the human mind is capable of imagining. Such a rule would require the expenditure of money and the employment of hands, so as to render it *perfectly* safe, and would prevent all persons of ordinary prudence from engaging in that kind of business. But the rule does require that the highest degree of practicable care and diligence should be adopted that is consistent with the mode of transportation adopted."¹⁹

¹⁷ Chicago, Burlington, & Quincy Railw. v. Hazzard, 26 Ill. 373.

¹⁸ Tuller v. Talbot, 23 Ill. 357.

¹⁹ This question is further illustrated in *Bowen v. New York Central Railw.*, 18 N. Y. 408, where it is said, the rule of responsibility of passenger carriers does not require "such particular precaution as it is apparent, after the accident, might have prevented the injury, but such as would be dictated by the utmost care and prudence of a very cautious person, before the accident, and without knowledge it was about to occur.

Mr. Justice *Johnson* here argues against requiring of passenger carriers every possible precaution against accident of which the mind can conjecture, as defining the precise rule of responsibility of common carriers of goods, as rendering them responsible for all casualties not produced by irresistible force, such as the act of God or the public enemy.

Passenger carriers are not held responsible for the wrongful act of strangers, or of any party not in privity with such carrier. Thus in *Curtis v. Rochester & Syracuse Railw.*, 18 N. Y. 534, the rule is explained more in detail by *Sel-*

§.348. As railway passenger carriers are bound to use all reasonable precautions against injury to passengers, it

den, J.: "Accidents may occur from a multitude of causes, even upon a railroad, for which the company is not responsible. If obstructions are placed by strangers upon the road, either through accident or design, the company is not responsible for the consequences, unless its agents have been remiss in not discovering them. The straying of cattle or horses upon the road causes numerous accidents which are not chargeable to the company."

It is said, in the last case cited, that where an accident occurs upon a passenger train, it may be fair to presume there was negligence or wrong somewhere; but that such presumption does not attach to the company, unless or until it appear that such accident was attributable to some defect in the road or equipment, or to some want of proper care and watchfulness on the part of the company or its agents. And the same is said in a recent English case, *Hammack v. White*, 11 C. B. (N. S.) 587, 594: "Mere proof of an accident having happened to a train does not cast upon the company the burden of showing the real cause of the injury." But it was held, in *Dawson v. Manchester, Sh. & L. Railw.*, 5 Law T. (N. S.) 682; s. c., 7 H. & N. 1037, that if a carriage break down, or run off the rail, this will be *prima facie* evidence of negligence. By running off the rail here must be understood spontaneously, it is apprehended, which sometimes occurs from improper construction, or want of care and skill in driving the engine, and may occur from other causes of analogous character. In *Pym v. Great Northern Railw.*, 2 F. & F. 619, it occurred from a defective rail. In a recent case in Maine, *Edwards v. Lord*, 49 Me. 279, where an injury occurred to the plaintiff from the upsetting of a stage-coach, it is said common carriers of passengers are bound to use more than ordinary care; they must use such care as very cautious persons exercise, and if an accident occur from any cause which any reasonable skill and care on their part might have prevented, they are responsible.

The question how far, and under what circumstances, the parties to any contract, express or implied, assume the hazard of providential occurrences, is extensively discussed in some late English cases. In *Taylor v. Caldwell*, 32 L. J. Q. B. 164; s. c., 3 B. & S. 826, the plaintiff had contracted with defendant for the privilege of delivering four lectures, on four different days, at the Surrey Gardens and Music Hall; but before the stipulated time arrived the buildings were destroyed by an accidental fire; and it was held that no recovery could be had. But in the very recent case of *Appleby v. Meyers*, Law Rep. 1 C. P. 615; s. c., 12 Jur. (N. S.) 500, C. B., June, 1866, it was decided, that where the plaintiff undertook to erect certain machinery, and to put the same in condition for use, and to keep the whole in order, under fair wear and tear for two years from the date of completion, and the building wherein the erections were to be made was destroyed by fire, without the fault of the defendant, after the erections were partially made, that the plaintiff was entitled to compensation for what he had done, as upon a *quantum meruit*.

These cases, and many others in the English books upon analogous subjects, such as claims for rent where the buildings are consumed by fire during the term, have professed to go upon the basis of the contract, either express or implied, between the parties. It has been said, that where the party contracts ab-

will be natural to measure these precautions by those in known use in the same business and the same vicinity or country. So that, if the company fail to adopt the most approved modes of construction and machinery in known use in the business, and injury occur in consequence, they will be responsible, and very justly. As was said in a late English case²⁰: The company "was bound to use the best precautions in known practical use to secure the safety of their passengers; but not every possible preventive which the highest scientific skill might have suggested. Hence if companies see fit to adopt an untried machine or mode of construction, the experiment will be at their own risk, and if injury occur to passengers thereby they are responsible.

§ 349. In an important case²¹ appealed from the Prov-

solutely and unqualifiedly for a certain result, he must take the risk of all accidents, it being regarded as his own folly not to stipulate for such contingency. But this rule cannot with any propriety be applied to implied undertakings, which are nothing more than the reasonable implications of the law from a given state of facts. And in making such implications the law will annex all reasonable and just conditions. So that in regard to the undertakings of carriers of goods and passengers, the law has attached certain conditions to the general undertaking, implied from entering upon the transit, that the thing or the person is to be carried safely through in a reasonable or the ordinary time, unless prevented, in the case of carriers of goods, by some invincible obstacle, like the act of God, or the public enemy, and in the case of carriers of passengers, that it shall be so done, unless prevented by some agency not under the carrier's control, by the exercise of the strictest care and diligence consistent with the successful conduct of the business.

²⁰ *Ford v. London & Southwestern Railw.*, 2 F. & F. 730, by Chief Justice *Erle*. But in *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312, it was held that a ferry company were not bound to adopt a new and improved method, because safer and better than the one used by them, if not requisite to the reasonable safety and convenience of passengers, and especially where the expense is excessive, that of itself being a sufficient reason to decline to adopt it, if inconsistent with the remunerative results of the business. The comments of *Colt, J.*, upon the question of requiring common carriers of passengers to adopt the most approved modes to secure safe transportation and how far this rule must necessarily be subject to the qualification that its expense was not destructive of the business of the carrier, are worthy of consultation.

²¹ *Great Western Railw. v. Fawcett*; *Same v. Braid*, 1 Moore, P. C. C. (N. S.) 101; 9 Jur. (N. S.) 339.

ince of Canada, and heard before the Judicial Committee of the Privy Council, it was held that where an injury accrues from the improper construction of a railway, the fact of its having given way will amount to *prima facie* evidence of its insufficiency, and the evidence may become conclusive from the absence of any proof on the part of the company to rebut it. A railway company, in the formation of its line, is bound to construct its works in such a manner as to be capable of resisting all violence of weather, which in the climate through which the line runs might be expected, though rarely, to occur. But where the company had employed skillful engineers, and used all ordinary precautions in the construction, to have the work properly done, and the giving way of the railway was caused by a storm of unusual magnitude, these facts should be brought to the attention of the jury, and their bearing upon the question of negligence fully explained to them; but as the verdict in this case seemed, on the whole, in conformity with the rules of law applicable to the evidence, the judgment thereon was affirmed.

§ 350. Although the happening of damage to a passenger, while carried by common carriers of passengers, is presumptive evidence of negligence on their part, they are not responsible if their neglect did not contribute to the damage.²² And the passenger-carrier is at liberty to stipulate for exemptions from responsibility except for willful or gross neglect or recklessness.²³

§ 351. Where the perils of the way naturally require special watchfulness on the part of the passengers, it is the duty of the carrier to apprise them of the peril, in order to enable them to take the requisite precaution to leave the carriage, and he is liable for any injury which accrues to

²² *Tennery v. Pippinger*, 1 Wallace, Philadelphia, 543. See also *Thayer v. St. Louis, &c., Railw.*, 22 Ind. 26.

²³ *Boswell v. Hudson River Railw.*, 5 Bosw. 699.

the passenger in consequence of such omission.²⁴ And where dangerous operations are going forward upon and over the railway, which may expose the passengers to peril, it is the duty of the company to guard against such perils, although the workmen are not under their control.²⁵

§ 352. One who procures a ticket for a passage in the company's cars is to be regarded as a passenger from the time he purchases his ticket; and it is the duty of the company to provide such person a safe passage to his seat in the cars, and to guard against all perils which may befall him in the mean time, as far as that is practicable both by general regulations and special directions, at the time, when it becomes necessary to cross the railway track, in order to take such seat.²⁶

§ 353. It is the duty of passenger carriers to exclude from their carriages all lawless and disorderly persons, and where such persons come upon their carriages, in spite of all efforts on their part, to stop the train and rally all force in their power, and exclude the intruders²⁷ — and probably after failing in that, either to discontinue that trip, or give the passengers an opportunity to leave the carriages, if they choose, before the train proceeds. If this is not done, the carrier will be responsible for the acts of the intruders.

§ 354. A railway company is bound to fence its station so that the public may not be misled by seeing a place

²⁴ *McLean v. Burbank*, 11 Minn. 277. *Ellsworth, J.*, in *Derwort v. Loomer*, 21 Conn. 245, 254; *Dudley v. Smith*, 1 Camp. 167.

²⁵ *Daniel v. Metropolitan Railw.*, Law Rep. 3 C. P. 216.

²⁶ *Warren v. Fitchburg Railw.*, 8 Allen, 227. In the English and continental railways, no passenger is allowed to cross the tracks, except upon a bridge above, or a tunnel below the line. But it is, nevertheless, constantly done there, to save time; but always at the peril of the passenger. Some such arrangement is requisite certainly for perfect safety, and where none such exists, it is clearly the duty of the company to caution passengers when trains are due.

²⁷ *Pittsburgh, Fort Wayne, & Chicago Railw. v. Hinds*, 7 Am. Law Reg. (N. S.) 14; s. c., 53 Penn. St. 512.

unfenced, into passing that way, being the shortest, to the station.²⁸

§ 355. A case of considerable interest has recently arisen in the circuit court of the United States, in the Connecticut District, before *Shipman, J.*²⁹ The plaintiff was very seriously injured, while a passenger on board one of the defendants' boats, by reason of the discharge of a musket, by being dropped on the deck of the boat by one soldier engaged in a struggle with another soldier, such soldiers, with others, being carried by the defendants, at the same time, with other passengers, who were civilians, the plaintiff being of the latter class. It was held, that passenger carriers, for hire, are bound to exercise the utmost vigilance and care in maintaining order and guarding those they transport against violence from whatever source arising, which might be reasonably anticipated, or naturally expected to occur, in view of the circumstances, and of the number and character of the persons on board. Under this rule the carrier is bound to protect one passenger from the violence of another. And it was further held, that in the present case, the carrier was not excused by showing that he was compelled by the government to receive the soldiers on board, and that they were in charge of officers; clearly not when he afterwards voluntarily received the plaintiff as a passenger without notice to him of the enforced presence of the soldiers.³⁰

²⁸ *Burgess v. Great Western Railw.*; 6 C. B. (N. S.) 923.

²⁹ *Flint v. Norwich & New York Transp. Co.*, 34 Conn. 554. SUPPLEMENT.

³⁰ As a general rule the government can only compel a carrier to transport soldiers and munitions of war when they assume the entire control of his means of transportation, and supply a full freight. Military and civil passenger transportation cannot be properly carried on at the same time and in the same vessels.

CHAPTER II.

LIABILITY, WHERE BOTH PARTIES ARE IN FAULT.

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| <p>§ 356. <i>Company not liable unless in fault.</i></p> <p>§ 357. <i>Not liable where plaintiff's fault contributes directly to injury.</i></p> <p>§ 358. <i>Company liable, for willful misconduct, or such as plaintiff could not avoid.</i></p> <p>§ 359. <i>Plaintiff may recover for gross neglect of company, although in fault himself.</i></p> <p>§ 360. <i>But not where he knew his neglect would expose him to injury.</i></p> <p>§ 361. <i>May recover although riding in baggage car.</i></p> <p>§ 362. <i>Company do not owe such duty to wrong-doers.</i></p> <p>§ 363. <i>May recover although out of his place on the train.</i></p> <p>§ 364. <i>Plaintiff affected by negligence of those who carry him.</i></p> <p>§ 365. <i>Fault on one part will not excuse the other, if he can avoid committing the injury.</i></p> <p>§ 366. <i>Negligence to be determined by the jury, where evidence conflicts.</i></p> <p>§ 367. <i>Plaintiff must be lawfully in the place where injured.</i></p> <p>§ 368. <i>Passengers bound to conform to regulations of company, and directions of conductors.</i></p> <p>§ 369. <i>Precautions to be used by passengers.</i></p> <p>§ 370. <i>Proof of negligence on plaintiff.</i></p> <p>§ 371. <i>After proof of presumptive negligence,</i></p> | <p><i>company must show that no reasonable precaution could escape it.</i></p> <p>§ 372. <i>One crossing a railway track must look out for trains, or he cannot recover.</i></p> <p>§ 373. <i>Rushing across a track when a train is approaching is foolhardy presumption.</i></p> <p>§ 374. <i>One cannot recover for an injury the result of heedlessness.</i></p> <p>§ 375. <i>The degree of precaution required of passenger-carriers.</i></p> <p>§ 376. <i>English courts recognize no difference between negligence and gross negligence.</i></p> <p>§ 377. <i>Negligence to preclude recovery must directly tend to produce the injury.</i></p> <p>§ 378. <i>Ordinarily proof must be given of defendants' negligence, and that but for such negligence the injury would not have occurred.</i></p> <p>§ 379. <i>Passenger carriers must provide suitable accommodations for all passengers.</i></p> <p>§ 380. <i>Then passengers must conform to the usages and rules of the company or fail to recover.</i></p> <p>§ 381. <i>Where passenger is injured by the fault of carrier's employees he may recover, but not if done by his own invitation.</i></p> |
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§ 356. To the liability of a railway company, as passenger carriers, two things are requisite, — that the company

shall be guilty of some negligence which, mediately or immediately, produced or enhanced the injury; and that the passenger should not have been guilty of any want of ordinary care and prudence which directly contributed to the injury; since no one can recover for an injury of which his own negligence was in whole, or in part, the proximate cause.¹

§ 357. But one is only required to exercise such care as prudent persons, under his particular circumstances, might reasonably be expected to exercise. Hence a very young

¹ Robinson v. Cone, 22 Vt. 213; Butterfield v. Forrester, 11 East, 60; Simpson v. Hand, 6 Wharton, 311; Rathbun v. Payne, 19 Wend. 399; Barnes v. Cole, 21 id. 188; Hartfield v. Roper, id. 615.

In this last case the rule was carried to the extreme verge in denying the recovery, and it seems at variance with the more recent cases upon the subject. See Robinson v. Cone, 22 Vt. 213; and Lynch v. Nurdin, *infra*; also, Birge v. Gardiner, 19 Conn. 507; Collins v. Albany & Sch. Railw., 12 Barb. 492. In the late case of Martin v. The Great Northern Railw., 16 C. B. 179, 30 Eng. L. & Eq. 473, a query is made whether, if a passenger is hurt in a station of a railway company, after being booked as a passenger, and while going to the train, through the defective lighting of the station, he is precluded from a recovery by reason of his own negligence having contributed to the injury, a distinction being attempted between negligence which is a violation of contract, and that which is only a violation of the general duty to use your own so as not needlessly to injure others. It is no excuse for the carrier's negligence that the negligence of a third party, no way connected with the carrier or the passenger, also contributed to the injury. Eaton v. Boston & Lowell Railw., 11 Allen, 500.

We allude to this, not as having marked out any intelligible ground of distinction, but as another indication of a disposition to restrain the universal application of the former rule, that the slightest possible negligence on the part of the plaintiff will, in all cases, prevent a recovery. See Ohio & Miss. Railw. v. Gullett, 15 Ind. 487, where, in a suit against a railway company for injuries received while standing on the platform of one of the company's stations, by the falling of wood from a train passing by, alleged to have been carelessly loaded, run, and managed, it is held, that if the injury resulted from any negligence on the part of the plaintiff, he cannot recover.

See also Spencer v. Utica & Sch. Railw., 5 Barb. 337; Brand v. Troy & Sch. Railw., 8 Barb. 368; Richardson v. Wil. & R. Railw., 8 Rich. 120. This was an action in favor of the master for killing his slave while asleep upon the track of the railway. The court held that the negligence of the slave would prevent the recovery. Galena & Chicago Railw. v. Fay, 16 Ill. 548. In Fairchild v. California Stage Co., 13 Cal. 599, where an injury occurred to a person travelling on a stage-coach, it is held that in case of injury, the presumption is, *primâ facie*, that it occurred by the negligence of the coachman.

child, or perhaps one deprived of some of the senses, or who was laboring under mental alienation, or a very timid or feeble person, would not be precluded from recovering for the negligence of others, when persons of more strength or courage or capacity might have escaped its consequences.² And although the plaintiff's misconduct

² *Robinson v. Cone*, 22 Vt. 213; *Lynch v. Nurdin*, 1 Ad. & El. (N. S.) 29.

The general proposition that plaintiff's negligence contributing directly to the injury will preclude a recovery, is maintained in a very great number of cases. *Vanderplank v. Miller*, 1 Moo. & M. 169; *Luxford v. Large*, 5 C. & P. 421; *Sill v. Brown*, 9 id. 601; *Harlow v. Humiston*, 6 Cow. 189, 119.

In the case of *Sill v. Brown*, which is regarded as an important and somewhat leading case upon this particular point, the defendant was in fault in carrying the anchor of his brig in a position contrary to the established rules of the navigation, without which the collision complained of would not have occurred. But the plaintiff was also in fault in departing from the known rules of the navigation, and thereby bringing his barge into the position where she was struck by defendant's brig. But if the defendant had not been also in fault, the plaintiff's departure from the rules of the navigation would not have brought the defendant's brig in contact with his barge. And the parties being thus about equally in fault, so that the damage could not have occurred if either had conformed to the rules of the navigation, it was held the plaintiff could not recover. And by parity of reasoning, if the defendant was guilty of such fault, that the damage was inevitable, he should be held responsible to the extent that he clearly caused the damages, without regard to the defendant's fault. But it is questionable how far the decisions will yet fully justify this rule even. The courts seem to be very dull and slow in bringing the rule of responsibility, where both parties are in fault, to this clear test of principle. It is easier to say, that if the plaintiff is in fault, he cannot recover, than to define the exact extent of the rule as stated above.

But it seems well settled, that the mere fact that both parties were in fault at the time the injury occurred, will not always preclude a recovery. *Raisin v. Mitchell*, 9 C. & P. 613; *Smith v. Dobson*, 3 M. & G. 59.

In *Lynch v. Nurdin*, 1 Q. B. 29, *Denman*, C. J., says: "Ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation." *Beers v. Housatonic Railw.*, 19 Conn. 566; *Neal v. Gillett*, 23 Conn. 437. In a trial in Connecticut, before Mr. Justice *Seymour*, of the Superior Court, a case of some interest was submitted to a jury. The facts were, that the plaintiff, a child two years old, who sued by guardian, while on the track of the Norwich & Worcester Railway, was run over by a train, and had a leg and hand amputated in consequence. The learned judge left the question of negligence, in both parties, to the jury, saying he did not think negligence could fairly be imputed to so young a child, and that the negligence of the parents, if any, would not hinder plaintiff's recovery, if the defendants, after discovering the plaintiff on the track, might have prevented the injury, which is certainly the more common test of liability in similar cases. The jury gave the plaintiff a verdict for \$1800.

may have contributed remotely to the injury, if the defendant's misconduct was the immediate cause of it, and

But the case will doubtless go before the full bench, and there may be other questions involved. *Ranch v. Lloyd*, *ante*, § 133, pl. 7, 10, 11. The case of *Daley v. Norwich & Worcester Railw.*, came before the Supreme Court, 26 Conn. 591, where Mr. Justice *Ellsworth* reviews the cases, and sustains the doctrine of the text to the fullest extent. *Pennsylvania Railw. v. Kelly*, 31 Penn. St. 372. And the fact that the person injured was trespassing at the time, is no excuse, unless he thereby invited the act, or his negligent conduct contributed to it. *Daley v. Norwich & Worcester Railw.*, *supra*; *Brown v. Lynn*, 31 Penn. St. 510; *Cleveland, Columbus, & Cincinnati Railw. v. Terry*, 8 Ohio (N. S.) 570.

But in *Singleton v. Eastern Counties Railw.*, 7 C. B. (N. S.) 287, it was held, that where a child, three and a half years old, strayed upon a railway, and had its leg cut off by a passing train, in the absence of all evidence to show that the child came upon the track through the negligence or default of the company, they were not responsible. But the court disclaims all purpose of qualifying the former cases. And in *Waite v. Northeastern Railw.*, El., Bl., & Ellis, 719, where a child too young to take care of itself, and being under the charge of another, who took tickets for both, and while waiting for the train the child was injured by an accident which was caused by the joint negligence of the one who had the child in charge, and the company's servants, it was held the child could not maintain an action against the company.

This was in the Exchequer Chamber, and the facts were, that where a child five years old, in the care of his grandmother, at a railway station, was injured by a goods train, in crossing the track to the passenger carriages, the jury having found negligence, both in the servants of the company, and in the grandmother, it was held that the plaintiff was so identified with his grandmother, that by reason of her negligence an action in his name could not be maintained against the company. 5 Jur. (N. S.) 936. See also *Hughs v. Macfie*, 2 H. & C. 744; 10 Jur. (N. S.) 682, where a similar rule is declared to that in *Singleton v. Eastern Counties Railw.*, *supra*.

In *Oldfield v. N. Y. & Harlem Railw.*, 3 E. D. Smith, 103, it is held, that negligence is not presumed, as matter of law, from a child six or seven years of age being unattended in the streets of a city. Whether permission to the child to go into the streets, in that way, is negligence, is for the jury to determine, from the circumstances of each case. The company will be held responsible for any unsafe arrangement in getting over the track, as for an injury by reason of an unsafe bridge. *Longmore v. Great Western Railw. Co.*, 19 C. B. (N. S.) 183; *Nicholson v. L. & Y. Railw. Co.*, 3 H. & C. 534. So where the train is longer than the platform, and a passenger is injured by jumping to the ground, and the jury award £500 damages. *Foy v. London, Brighton, & So. Coast Railw. Co.*, 18 C. B. (N. S.) 225. So where there was a swing gate at a level crossing, and no one to tend it, 100 trains passing daily. *Bilbee v. Same*, *id.* 584; *Stubley v. London & Northwestern Railw. Co.*, 4 H. & C. 83; s. c., 11 Jur. (N. S.) 954; *Stapley v. London, Brighton, & South Coast Railw. Co.*, Law Rep. 1 Exch. 13; *Wyatt v. Great Western Railw. Co.*, 6 B. & S. 709. The rule in Massachusetts is that the negligence of those who have the charge of children or others, laboring

with the exercise of prudence he might have prevented it, he is not excused.³

§ 358. So, too, where there is intentional wrong on the part of the defendant, he is liable, notwithstanding negligence on the part of the plaintiff.⁴ And if the defendant is guilty of a degree of negligence from which the plaintiff, with the exercise of ordinary care, cannot escape, he may recover, although there was want of prudence on his part.⁵

under physical or mental inability to exercise caution on their own behalf, will affect their right of action the same as in other cases. *Holly v. Boston Gas Light Co.*, 8 Gray, 123; *Wright v. Malden & Melrose Railw.*, 4 Allen, 283.

³ *Davies v. Mann*, 10 M. & W. 546; *Illidge v. Goodwin*, 5 C. & P. 190. See also *Augusta & Savannah Railw. v. McElmurry*, 24 Ga. 75. But where the plaintiff undertook to pass across a freight train standing between the station and the passenger train, and just ready to start, without informing those having charge of the former train, and was so injured that he died, in consequence of the movement of the freight train, it was held the company was not liable. But it was suggested that such an act, in the case of a child or person of less than ordinary discretion, might not have precluded the recovery against the company. *Chicago, etc., Railw. v. Dewey*, 26 Ill. 255. So, too, the plaintiff cannot recover for the injury resulting from the negligence of the defendant, if notwithstanding such negligence he might have avoided the injury, by the exercise of care and prudence on his part, or if his want of care and prudence, or that of the party injured, in any way contributed directly to the injury. *Post*, ch. xix.; *State v. Baltimore & Ohio Railway*.

⁴ *Brownell v. Flagler*, 5 Hill (N. Y.) 282. This is the case of a drover knowingly driving off a lamb which had strayed into his drove, and he was held liable, although the plaintiff was first in fault, and defendant, in selling his drove, did not take pay for this lamb.

⁵ *Bridge v. Grand Junction Railw.*, 3 M. & W. 244. In a late case in Georgia, *Macon and Western Railw. v. Davis*, 18 Georgia, 679, 686, the rule of law here adverted to is approved by a judge of large experience and reputation. "We approve of modification of the principle, and think that it ought to be left to the jury to say whether, notwithstanding the imprudence of the plaintiff's servant, the defendant could not, in the exercise of reasonable diligence, have prevented the collision." So also in *Runyon v. Central Railw.*, 1 Dutcher, 556.

But where the plaintiff's conduct is reckless and rash, he cannot recover if such negligence contributed to the injury and the defendant acted in good faith. *Sheffield v. Rochester and Syracuse Railw.*, 21 Barb. 339; *Galena and Chicago Railw. v. Fay*, 16 Illinois, 558. See also *Center v. Finney*, 17 Barb. 94; *Moore v. Central Railw.*, 4 Zab. 268, 824; *Mackey v. New York Central Railw.*, 27 Barb. 528.

And in *Macon & W. Railw. v. Wynn*, 19 Ga. 440, it is held, that if, notwith-

§ 359. And, in many cases, the plaintiff has been allowed to recover for the gross negligence of the defendant, notwithstanding he was, at the time, a trespasser upon the defendant's rights.⁶

§ 360. But in all cases where both parties are in fault, and the plaintiff's fault was upon a point which he knew, or had reason to believe, would or might contribute to the injury, he cannot recover; and the rule laid down by Lord *Ellenborough*, Ch. J., in *Butterfield v. Forrester*, applies to the great majority of cases involving this inquiry: "One person being in fault will not dispense with another using ordinary care for himself. Two things must concur to support this action: an obstruction in the road, by the default of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

§ 361. One being in the baggage car, with the knowledge of the conductor, will not preclude him from a recovering the negligence of defendant, the plaintiff in the exercise of common care and prudence might have avoided the injury, he cannot recover. And the general proposition, held in the same company *v. Davis*, *supra*, is reaffirmed in the *Central Railw. and Banking Co. v. Davis*, 19 Ga. 437.

⁶ *Birge v. Gardiner*, 19 Conn. 507; *Bird v. Holbrook*, 4 Bing. 628. This is the case of spring-guns set in the defendant's grounds without plaintiff's suspecting it. See also *Ilott v. Wilkes*, 3 B. & Ald. 304, where the plaintiff had reason to suspect the danger, and might by the exercise of prudence have escaped it, and he failed to recover. *Cotterill v. Starkey*, 8 C. & P. 691. There are numerous cases where a party has been held responsible for allowing real property to remain and be used in a condition unsafe for others, who might rightfully or even wrongfully pass it. As where one employed a coal-dealer to put coal upon his premises, and in so doing he opened a trap-door and by means of its not being properly guarded a person having occasion to pass there was injured by falling into it. *Pickard v. Smith*, 10 C. B. (N. S.) 470. But where one has a mere license to pass premises, and the owner has machinery there and a shaft sunk in connection therewith, the contractor is not responsible for insufficient fencing, whereby such person is injured. *Bolch v. Smith*, 7 H. & N. 736. Nor is a canal company bound to fence or light the banks of the canal. *Bincks v. S. Y. & R. D. Nav. Co.*, 3 B. & S. 244; s. c., 7 L. T. (N. S.) 350. Nor is a railway company liable for having stairs in improper condition for safe use, unless, where one fell down the stairs, it is shown the accident occurred from the defect. *Davis v. London & Br. Railw.*, 2 F. & F. 588; see also *Wilkinson v. Fairrie*, 1 H. & C. 633; s. c., 9 Jur. (N. S.) 280; *Hadley v. Taylor*, Law Rep. 1 C. P. 53; s. c., 11 Jur. (N. S.) 979; *Gray v. Pullen*, 11 L. T. (N. S.) 569; *Welton v. Dunk*, 4 F. & F. 298; *Lee v. Riley*, 18 C. B. (N. S.) 722.

ery for an injury caused by a collision, even though he might or would not have been injured if he had remained in the passenger car.⁷ And where a passenger upon a stage-coach was injured by the overturning of the carriage, after he had been requested by the driver to ride inside the carriage, and had refused, and was told that if he kept the outside he must do it at his own risk, it was held that this would not exonerate the carrier, it appearing that the accident occurred from the negligence of the driver, and that the position of the plaintiff in no way contributed to it.⁸ And we apprehend that the plaintiff's negligence, in order to excuse the defendant from responsibility, must always be such as contributed directly to the injury.⁹

§ 362. And where the locomotive of a railway ran across the legs of a person while walking upon their track in the streets of a city, it was held that the party could not recover if his own negligence contributed to the injury; and that a railway is not bound to the same degree of care in regard to mere strangers who may voluntarily, but unlawfully, go upon their track, which they owe to passengers conveyed by them.¹⁰

⁷ *Carroll v. N. Y. & N. H. Railw.*, 1 Duer, 571. The Court here say: "He was under no obligation to be more careful and prudent than he was, in contemplation of there possibly being such highly culpable conduct on their part." But where, by the general regulations of the company, its engineers were prohibited from allowing any one not in its employ to ride upon the engine, and the plaintiff was permitted to ride upon the engine by the engineer without paying fare, after he had been informed of the company's regulations upon the subject, and sustained an injury while so riding, it was held that he was a wrongdoer and could not recover, the consent of the engineer conferring no legal right. It was also said, that the *onus* of showing the authority of the engineer was upon the plaintiff, the presumption being that the plaintiff had no right to ride upon the engine, whether he paid fare or not. *Robertson v. New York and Erie Railw.*, 22 Barb. 91.

⁸ *Keith v. Pinkham*, 43 Maine, 501.

⁹ *Colegrove v. N. Y. & Harlem & N. Y. & N. H. Railw.*, 6 Duer, 382.

¹⁰ *Brand v. Troy and Sch. Railw.*, 8 Barb. 368. The latter proposition stated in the text in reference to this case, seems to us highly reasonable and just. See *Philadelphia & Reading Railw. v. Hummell*, 44 Penn. St. 375.

§ 363. It was held that a passenger, who, having live-stock upon the train of freight cars, was, by the regulations of the company, required to remain upon the cars that contained his stock, was not precluded from recovering for an injury by collision with another train by reason of his being, at the time, in another part of the train.¹¹

§ 364. And it seems that the negligence of those who carry the plaintiff, contributing to the injury, will preclude his recovery as much as if it were his own act.¹² But the

¹¹ *The Penn. Railw. v. McCloskey*, 23 Penn. St. 532. In this case it is said a passenger is not in fault in obeying the specific instructions of the conductor, although in conflict with the general regulations of the company, known to him.

¹² *Thorogood v. Bryan*, 8 C. B. 115; *Catlin v. Hills*, id. 123. In this case it was held, where a collision occurs through the fault of two companies, running on the same track, and the suit is against them jointly, it is a misjoinder, but may be waived by pleading to the merits. Held, also, that each company, in such case, is liable for the injury to plaintiff, although both are in fault, and that plaintiff may recover, notwithstanding he was standing on the platform of the car, there being no notice posted up in the car prohibiting such practice, as required by the statute, and no right in the other company to run on the track that day, and no reasonable ground to apprehend they would attempt to do so.

In this case the charge to the jury, that the plaintiff's negligence, in order to defeat the action, must have contributed to the "accident which caused the injury," was held well enough, and in popular language equivalent to saying that it "must have contributed to the injury complained of." But it seems to us these terms are not altogether equivalent. The misconduct of plaintiff might not have the slightest agency in the production of the "accident which caused the injury," and still might have been the procuring cause of the injury itself. The word accident is susceptible of such an application as to stand for the injury itself. But the charge in this case excluded that view; and in popular language the "accident is the cause of the injury." See *Chicago, Burlington, & Quincy Railw. v. Coleman*, 18 Ill. 297.

Where the vehicle of a passenger-carrier is injured by a collision resulting from the mutual negligence of those in charge of it and of another party, the carrier must answer for the injury. But if the negligence of the carrier did not directly contribute to the injury, though there may have been negligence in a general sense, the other party will be answerable if the act of his servant or agents was the proximate cause of the disaster. *Lockhart v. Lichtenthaler*, 46 Penn. St. 151.

A query is here made as to whether the defense of concurrent negligence in the agencies producing death, if a defense at all, can be heard without being specially pleaded. But the contrary is held in *Colegrove v. N. Y. & Harlem, & N. Y. & N. H. Railways*, 6 Duer, 382, and in *Chapman v. N. H. Railw.*, 19 N. Y. 341.

negligence must be of a character directly and naturally to contribute to the injury, it would seem, in either case.¹²

§ 365. One party being in fault will not excuse the other party, if, by the exercise of ordinary care, he might still have avoided the injury, notwithstanding the fault of the first party.¹³ This point is illustrated by a recent case,¹⁴ where a boy, ten years old, wrongfully came upon a street railway car, while it was in motion, without the means or the intention of paying fare.

§ 366. And what is proper care will be often a question of law, where there is no controversy about the facts.¹⁵ But ordinarily, we apprehend, where there is any testimony tending to show negligence, it is a question for the jury.¹⁶

¹² *Trow v. Vermont Central Railw.*, 24 Vt. 487; 13 Ga. 86.

¹⁴ *Lovett v. Salem & So. Danvers Railw. Co.*, 9 Allen, 557; *Owens v. Hudson River Railw.*, 2 Bosworth, 374.

¹⁵ *Trow v. Vt. Central Railw.*, 24 Vt. 487; *Henning v. N. Y. & Erie Railw.*, 13 Barb. 9; *Gahagan v. Boston & Lowell Railw.*, 1 Allen, 187.

¹⁶ *Quimby v. Vermont Central Railw.*, 23 Vt. 387; *Briggs v. Taylor*, 28 Vt. 180; *Patterson v. Wallace*, 1 McQu. Ho. Lds. 748, 28 Eng. L. & Eq. 48. Here the judgment of the court below was reversed, although there was no controversy about the facts, but only as to whether a certain result was to be attributed to negligence on one side, or rashness upon the other, the judge having withdrawn the case from the jury, in the court below, it was held, in the House of Lords, to be a pure question of fact for the jury. See *Taff Vale Railw. v. Giles*, 2 El. & Bl. 822; s. c., 22 Eng. L. & Eq. 202; *N. Y. & Erie Railw. v. Skinner*, 21 Penn. St. 298. In *Murray v. Railw. Company*, 10 Rich. (S. C.) 227, it was held, that it was the duty of a railway company to slacken speed at a turnout, and to give warning when approaching a crossing; and it must not appear that such duties were disregarded, when the company attempt to show themselves not guilty of negligence. See *Chicago, Burlington, & Quincy Railw. v. Hazzard*, 26 Ill. 373, where it is held, that it is not negligence in an engineer of a train, on arriving at a station, if he should let on more than the exact quantity of steam necessary to overcome the friction of frogs and switches, thereby creating a jerking motion of the train, provided in so doing he exercises a reasonable discretion.

It is not usual to place a chain across the back end of the platform of a caboose car, and the omission to do so is not negligence. A passenger taking a freight train takes it with the increased risk or diminution of comfort incident thereto, and if it is managed with the care requisite for such trains, it is all that those who embark on it have a right to demand. *Ib.*

And where one attempted without any necessity, to pass between cars in motion, propelled by an engine, it was held to be such unequivocal evidence of neg-

§ 367. It has been held that a passenger in a railway car is not bound, in order to entitle himself to an indemnity against the negligence of the company, to select his seat so as to incur the least hazard.¹⁷ All that is requisite in such case is that the plaintiff should, at the time, have been where it was lawful for him to be.¹⁷

§ 368. If one should contrary to the general regulations of the company notified to him generally, and especially by particular notice from the conductor at the time, expose himself to peril, as by letting his hand remain out of the car window while passing a bridge, it would be evidence of gross carelessness upon his part, which would, on that ground alone, justify a verdict against his claim for damages.¹⁸

ligence, that the court were justified in charging the jury, as matter of law, that the party could not recover. *Gahagan v. Boston & Lowell Railw., supra*. And where a person of mature years knew that a freight train was standing ready to move between him and the passenger train, and that his passing in the night time through the freight train might not be seen by those managing it, and they were not notified of his design to pass, it was held that should he attempt to pass, and be injured, it would amount to such negligence on his part as to defeat a recovery. It would be otherwise had a child or person of less than ordinary discretion so conducted. *Chicago, Burlington, & Quincy Railw. v. Dewey*, 26 Ill. 255. See also *Chicago, Burlington, & Quincy Railw. v. Hazzard, supra*.

¹⁷ *Carroll v. N. Y. & N. H. Railw.*, 1 Duer, 571, 572.

¹⁸ *Laing v. Colder*, 8 Penn. St. 479. But see *N. J. R. v. Kennard*, 21 Penn. St. 203, where it was held, that if a railway company run passenger cars upon a road where the way is so narrow as to endanger the arms of the passengers, while resting in the windows of the cars, they are bound to provide wire gauze, bars, slats, or other barricades, to prevent the passengers putting their arms out of the windows, or they are liable for all injuries happening in consequence of such omission. But to deprive the party of his right to recover, it must appear that his violation of the rules of the company, or the orders of the company's servants, contributed to the injury. And where the conductor of a gravel train, who was prohibited by the company letting persons ride, as passengers, and who informed defendant in error of the prohibition, nevertheless consented to take him as a passenger, and received fare from him, it was held he might recover of the company for an injury, through the negligence of their servants, during his passage. *Lawrenceburgh & Upper Miss. Railw. v. Montgomery*, 7 Porter (Ind.), 474. See also *Zemp v. W. & M. Railw.*, 9 Rich. 84, where the plaintiff was injured while standing on the platform of the cars, the passengers remaining in the cars uninjured, and it appearing that notices were posted up in the cars prohibiting passengers from standing on the platforms, it was held to be a question for the jury whether the plaintiff had notice of the prohibition, and also whether the

§ 369. But one is not precluded from recovery for an injury caused by the negligence of the company, because he was standing upon the platform of the cars. And the statute of the State of New York providing that where a passenger is so injured the company shall not be liable, provided there was at the time sufficient room in the inside of the cars for the accommodation of such passenger, has reference to such casualties as prove injurious only to persons upon the platforms of the cars. And a railway company, in order to claim the exemption created by the statute, must show not only that there was room within the cars sufficient to contain the passenger, but that there were seats unoccupied. And passengers are not obliged to urge other passengers to give up half a seat, or even whole seats, needlessly occupied by them.¹⁹

§ 370. The burden of proof in regard to negligence in the company, and due care on his own part, is upon the plaintiff who alleges an injury by one of the company's engines.¹⁹ But as negligence on the part of the plaintiff is not to be presumed, he is not bound to introduce positive evidence of the negative; but where there is conflicting evidence upon the point, the burden of proof is upon him.²⁰

§ 371. After the presumption of negligence has been established against a carrier of passengers, it can only be rebutted by showing that the accident was the result of circumstances against which human prudence could not have guarded. By this we are to understand such pru-

fact of his disregarding it contributed to the injury, and they having failed to find these facts, and given the plaintiff ten thousand dollars damages, the judgment was affirmed in the Court of Appeals. *Ib.*

¹⁹ *Robinson v. Fitchburg & Worcester Railw.*, 7 Gray, 92.

²⁰ *Button v. Hudson River Railw.*, 18 N. Y. 248. But it has sometimes been claimed the plaintiff must give affirmative evidence of his own exercise of due care and caution at the time the injury occurred. But this, in principle, is much like one giving evidence of the good character of his witness, before any impeachment, and is never required, we think. See also *Barber v. Essex*, 27 Vt. 62; *Hill v. New Haven*, 37 Vt. 501.

dence as one might have taken before the occurrence, and not that which afterwards it may be apparent would have been proper.²¹

§ 372. One who attempts to cross a railway track about the time a train of cars is due, and with his head so bundled as to obscure his hearing, and without looking to see if the cars are approaching, is guilty of such negligence that he cannot recover for an injury thereby sustained; and it will make no difference that the engineer gave no warning of the approach of the train, as the statute requires. Such omission on the part of the company does not affect their liability otherwise than the omission of any common-law duty, unless some specific consequence is expressly provided in the statute as the result of such omission.²²

§ 373. One who, after the proper signals are given by a passing train, and while the flagman is upon the crossing waving his flag, is killed in attempting to rush his team across the track of a railway in a highway, is guilty of such reckless and foolhardy misconduct, that no recovery can be had for the injury.²³

§ 374. And where one, while waiting for a train, in the daytime, caught his foot against a weighing machine, the edge of which was raised a few inches above the platform where it was necessary to be used in weighing baggage, and thereby fell and broke his knee-pan, it was held there was no evidence to go to the jury.²⁴

§ 375. In a recent English case,²⁵ the question of the degree of caution required of passenger carriers is carefully considered. It is here said, that, in determining whether evidence of negligence has been given before the jury, the

²¹ *Bowen v. N. Y. Central Railw.*, 18 N. Y. 408.

²² *Steves v. Oswego & Syracuse Railw.*, 18 N. Y. 422.

²³ *Wild's Adm'x. v. Hudson River Railw. Co.*, 24 N. Y. 430.

²⁴ *Cornman v. Eastern Counties Railw.*, 4 H. & N. 781.

²⁵ *Crafter v. Metropolitan Railw. Co.*, Law Rep. 1 C. P. 300; s. c., 12 Jur. (N. S.) 272.

court must use the ordinary experience of life, and must consider whether the evidence of negligence be reasonable. And in commenting upon the case, which was where the plaintiff fell, upon a staircase, in going from the platform into the street, in consequence, as he alleged, of the stairs being rendered slippery by reason of brass nosing upon the edge of the steps, and having no hand-rail upon the top of the banisters, the learned judges declare, that passengers are not entitled to have every precaution to insure safety which it is possible to suggest, after an accident has occurred, might have prevented it.²⁵ If any actual damage accrues to the passengers from the construction of a passage which they will naturally take, the company are responsible,²⁶ as where there was an aperture in the railing of a bridge.²⁶ But if a stairway is protected by walls on each side, the railway company is not bound to maintain a hand-rail upon the top of it for passengers to steady themselves by; or to put lead upon the edge of the steps instead of brass, because it is less slippery. The opinion of witnesses is not competent evidence of the necessity of such precautions.²⁵

§ 376. The English courts seem finally to have come to the definite conclusion that there is no difference between negligence and gross negligence, the latter being nothing more than the former with a vituperative epithet.²⁷ And in the same case it was decided, that where the bill of lading specially excepted "perils of the sea," this will not embrace those perils which become disastrous by reason of the negligence or want of skill of the carrier and his servants. And the same rule was laid down in a former action against the same company.²⁸

§ 377. The question, what degree of negligence will

²⁶ Longmore v. Great Western Railw., 19 C. B. (N. S.) 183; Rigg v. M. Sheffield & L. Railw., 12 Jur. (N. S.) 524.

²⁷ Grill v. Iron Screw Collier Co., Law Rep. 1 C. P. 600; s. c., 12 Jur. (N. S.) 727.

²⁸ Lloyd v. The General Iron Screw Co., 3 H. & C. 284; s. c., 10 Jur. (N. S.) 661.

preclude the party from recovery of another who is guilty of negligence directly producing the injury, is extensively and judiciously discussed in *Isbell v. New York & N. H. Railway Company*,²⁹ and the conclusion reached, that it must be a direct and actual, and not merely a constructive wrong, and one that is the proximate cause of the injury, and not merely the remote and incidental cause of it.²⁹

§ 378. The rule of law deducible from the cases is fully and correctly stated, we believe, in a late case decided in the Exchequer in Ireland.³⁰ The plaintiff cannot recover unless the injury was caused by the negligence of the defendant; nor even then, if he has so far contributed to the accident, by want of ordinary care, that but for that the accident would not have happened; but strictly, even in that case, the plaintiff is not precluded from a recovery if the defendant might, by ordinary care, have avoided the consequences of the plaintiff's neglect. So also the mere happening of an accident is not sufficient evidence of negligence, ordinarily, to be left to the jury, but the plaintiff should give some affirmative evidence of negligence on the part of the defendant.³¹ But in many cases the very happening of the accident shows want of due care, as where the defendants let fall a barrel of flour upon the plaintiff as he was passing the street.³² And where an

²⁹ 27 Conn. 393. It is said in a late English case, *Cotten v. Wood*, 8 C. B. (N. S.) 568, 7 Jur. (N. S.) 168, that it is equally the duty of one crossing a street or road to look out for vehicles coming along, as it is for the drivers of these vehicles to be vigilant in not running against persons crossing; and one suing for such an injury must give affirmative and preponderating evidence of neglect of duty on the part of the driver. And it is here declared to be established, that where the evidence on each side, in cases of this kind, is equally strong against the other's negligence having caused the accident, the judge ought not to leave it to the jury as proving negligence either way. But, perhaps, where the evidence is conflicting, the judge is not the proper functionary to determine whether it is equally strong both ways. We should say he must submit it to the jury with instructions not to find a verdict upon an equal balance of evidence.

³⁰ *Scott v. Dublin & Wicklow R. Co.*, 11 Ir. Com. Law, 377.

³¹ *Hammack v. White*, 11 C. B. (N. S.) 588; s. c., 8 Jur. (N. S.) 796.

³² *Byrne v. Boadle*, 2 H. & C. 722. See also *Cox v. Brubridge*, 13 C. B. (N.

engine-driver blew off steam at a road crossing, on grade, where there was considerable passing, in such a manner as needlessly to frighten horses waiting to pass the line, it was held sufficient to warrant the inference that there was, in the company, actionable negligence.³³ It seems scarcely necessary to multiply cases to show, that passenger carriers must first see that those they carry are properly provided with every reasonable accommodation, and this being done, that passengers, who desire to secure their own safety, or failing of that to hold the carrier responsible for consequences, must keep in their places.

§ 379. Thus in the State of New York, where, by statute, passengers injured while standing upon the platforms of the cars while in motion, and in violation of express notices posted within their view, are precluded from maintaining an action, provided there was at the time sufficient room within the cars, it was held, that a passenger who selected the safest place he could find upon the platform, and was injured while standing there, was not within the provisions of the statute, unless the company provided him a seat within the cars, and that for that purpose he was not obliged to displace the person, or property, of another passenger, that being the duty of the conductor; and that it was no sufficient compliance with the statute, that there might have been sufficient room in a car, remote from the place where the plaintiff was allowed to enter.³⁴

S.) 430; s. c., 9 Jur. (N. S.) 970; *Scott v. London Docks Co.*, 3 H. & C. 596; s. c., 10 Jur. (N. S.) 108; s. c., 11 Jur. (N. S.) 204. It was here declared by the Exchequer Chamber, that where the thing which causes the accident is known to be under the management of the defendant or his servants, and the accident is such as would not happen in the ordinary course of management, the accident itself, if unexplained, is reasonable evidence of negligence. And this seems to be the true ground upon which to rest the question. Where there are two modes of doing work in a public highway from which damage may result to a passer-by, both of which are usual, but one more dangerous than the other, it is for the jury to determine whether it is negligence to adopt the mode whereby others are most exposed. *Cleveland v. Spier*, 16 C. B. (N. S.) 399.

³³ *Manchester & S. J. Railw. Co. v. Fullarton*, 24 C. B. (N. S.) 54.

³⁴ *Willis v. Long Island Railw.*, 34 N. Y. 670.

§ 380. So, also, where the plaintiff's arm, being outside the window, was injured by the swinging of the unfastened door of another car, it was held he could not recover, it being his duty to keep his entire person within the limits of the car he sat in. And in such case, it was held competent for the court to direct a verdict for the defendants, there being no controversy in regard to the plaintiff having voluntarily placed his arm beyond the point where the sash of the window would fall.³⁵ So, also, where a railway passenger train is stopped, at night, to allow a train in the opposite direction to pass, and no notice is given that the passengers may leave the cars, but the plaintiff left the cars and walked into an open cattle guard, and was injured, it was held he could not maintain any action therefor; and it will make no difference, that the plaintiff had been misinformed, by some one not in the employ of the company, that he must go and see to having his baggage passed at the custom-house, which the train was supposed to have reached; or that the train was near a passenger station, which was not his destination.³⁶

§ 381. In some English cases, actions have been brought for injuries to passengers by having their hands shut into the doors of the railway carriages. Such questions will not be likely to occur, unless where the same style of carriages are in use. In one case where the plaintiff placed his hand upon the carriage door to raise himself into the carriage, and the porter immediately closed the door, without giving any warning, shutting in and injuring the plaintiff's hand, the court declined to disturb a verdict in

³⁵ *Todd v. Old Colony Railw.*, 7 Allen, 207. But the court cannot decide as matter of law, that standing or riding on the outside platform of a street car is such carelessness as to preclude the party from recovery for an injury sustained by being thrown therefrom. *Meesell v. Lynn & Boston Railw.*, 8 Allen, 234. So also it is a question of fact, whether passengers may properly pass from one car to another, while in motion, in order to find a seat, at the suggestion of the defendants' servants. *McIntyre v. N. Y. Central Railw.*, 37 N. Y. 287. See also *Wayne v. Pennsylvania Railw.*, 53 Penn. St. 460.

³⁶ *Frost v. Grand Trunk Railw.*, 10 Allen, 387.

his favor.³⁷ But in another case, where the plaintiff suffered his hand to remain upon the doors after being seated in the cars, knowing the porters would immediately close them, and where timely notice was given before closing them, it was held the plaintiff could not recover.³⁸

³⁷ *Fordham v. Brighton Railw.*, Law Rep. 3 C. P. 368.

³⁸ *Richardson v. Metropolitan Railw.*, Law Rep. 3 C. P. 374 & n.

CHAPTER III.

INJURIES BY LEAPING FROM THE CARRIAGES.

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| <p>§ 382. <i>Passengers may recover, if they have reasonable cause to leap from the carriage, and sustain injury.</i></p> <p>§ 383. <i>But not where their own misconduct exposes them to peril.</i></p> <p>§ 384. <i>But may recover, if injured in attempting to escape danger.</i></p> <p>§ 385. <i>Cannot excuse leaping from cars because train passes station.</i></p> <p>§ 386. <i>Must resort to their action for redress.</i></p> <p>§ 387. <i>Rule of law, where train passes station.</i></p> | <p>§ 388. <i>Rules where a person enters the cars to see another seated.</i></p> <p>§ 389. <i>Company bound to stop their train a sufficient time.</i></p> <p>§ 390. <i>No recovery can be had where passenger leaves the cars on the wrong side.</i></p> <p>§ 391. <i>Recent decision in England.</i></p> <p>§ 392. <i>Dissenting opinion approved.</i></p> <p>§ 393. <i>The case affirmed in the Exchequer Chamber.</i></p> <p>§ 394. <i>Is still open to grave doubts.</i></p> |
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§ 382. It seems to be regarded as well settled, that a passenger who is induced to leap from the carriage, whether by coach or railway, by a well-founded apprehension of peril to life or limb, induced by any occurrences which might have been guarded against by the utmost care of the carriers, is entitled to recover for any injury which he may thereby sustain,¹ where no injury would have occurred if he had remained quiet,² or where the conduct of the passenger contributed to produce or enhance the injury.³

§ 383. In one case, where the passenger was taken upon the train after the passenger cars were filled, and was told that he must ride in the baggage car, and he consented to do so, but soon began boisterous play with others, and

¹ *Ingalls v. Bills*, 9 Met. 1; *Eldridge v. Long Island Railw.*, 1 Sandf. 89; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181; *Frink v. Potter*, 17 Ill. 406; *Southwestern Railw. v. Paulk*, 24 Ga. 356.

² *Jones v. Boyce*, 1 Stark. 493; *Ingalls v. Bills*, 9 Met. 1.

³ 13 Pet. (U. S.) 181.

obtruded into the passenger cars, and, when they were thrown from the track, leaped upon the ground and was injured,⁴ the court said: "The contract was for a passage in the baggage car. The carrier would have no right to overload and crowd passengers already in the other cars. When passengers take their seats they are entitled to occupy as against the carrier and subsequent passengers. While this right is recognized and protected to them, they are required to conduct themselves with propriety, not violating any reasonable regulation of the train." The court also held that the passengers have no right to pass from car to car, unless for some reasonable purpose; and, as the proof showed that the plaintiff below had no such excuse, and, had he remained in the car where he belonged, would not have been injured (that car not having been thrown from the track), or, probably, have felt any impulse to jump from that car, it was his own fault and folly which exposed him to the peril, and the company were not liable for its consequences, and the action could not be maintained.

§ 384. But, where one incurs peril by attempting to escape danger, the author of the first motive is liable for all the necessary or natural consequences.⁵

§ 385. But where, as in the last case, the person leaped from the cars because the train was passing the station at which he wished to stop, and after the conductor had announced the station, notwithstanding the conductor and brakeman assured him the train should be stopped and backed to the station, it was held, that the injury he received was the result of his own foolhardiness, and he could not throw it upon the company. The court below

⁴ *Galena & Chicago Railw. v. Yarwood*, 15 Ill. 468.

⁵ *Railw. Co. v. Aspell*, 23 Penn. St. 147, 150. The court here say: "If, therefore, a person should leap from the cars under the influence of a well-grounded fear that a fatal collision is about to take place, his claim against the company for the injury he may suffer will be as good as if the same mischief had been done by the apprehended collision itself." *McKinney v. Neil*, 1 McLean, 540, 550.

had charged the jury, that announcing the station by the conductor, while the cars were in motion, was itself an act of negligence, and the plaintiff had a verdict. But the judgment was reversed in the Court of Errors, which, in giving judgment, said:—

§ 386. “If a passenger is negligently carried beyond the station where he intended to stop, and where he had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of travelling back, because these are direct consequences of the wrong done him. But, if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, and for this, his own gross imprudence, he can blame nobody but himself.”

§ 387. In regard to the conductor announcing the station, the court said, “We consider the charge of the court below entirely wrong. It is not carelessness in a conductor to notify passengers of their approach to the station at which they mean to get off, so that they may prepare to leave with as little delay as possible when the train stops. And we cannot see why such a notice should put any man of common discretion in peril. It is scarcely possible that the plaintiff could have understood the mere announcement of the station as an order to leap from the cars without waiting for a halt.” And where the train passes its usual stopping-place, and a passenger leaps from the carriage while in motion to avoid being carried beyond his destination, and sustains an injury, he cannot recover.⁶

⁶ *Damont v. New Orleans & Carrollton Railw.*, 9 Louis. Ann. 441. But where the court charged the jury that it was clearly the duty of common carriers of passengers by railway, not only to call out the stations for which they have passengers, but to see that passengers and their baggage are put off at the proper stations, it was held too stringent a rule. *Southern Railway v. Kendrick*, 40 Miss. 374. But we apprehend such is the general practice of railway conductors, where only one or two or very few passengers leave at stations, and where there are more to notify them to leave at the next station, at the time of receiving their tickets. If railway conductors were held responsible, as they should be, to give clear information to all passengers, when and where to leave the cars, the

§ 388. And where a person enters the cars for the purpose of seeing another safely seated, and is injured in leaving them, he cannot recover if he was guilty of negligence which contributed to his injury. And where he attempted to leave the cars after they were in motion, and persisted in attempting to get out, it was held sufficient to preclude his recovery for an injury thereby sustained, notwithstanding the conductor gave him no special notice of the time of the departure of the cars, and was guilty of negligence in starting the cars, and in a jerk occurring soon after, both of which contributed to produce the injury.⁷

§ 389. The company are bound to stop their trains, at all stations where they profess to leave passengers, a sufficient time to enable them to alight. And if they do not, and one is injured in consequence while attempting to leave the cars, the company are liable.⁸

§ 390. But if the company had prepared a platform for the accommodation of passengers leaving the cars, and a passenger leaves the cars on the opposite side and is killed in consequence, the company are not responsible, not having been in fault. And even if both parties had been in fault, there could have been no recovery.⁹

§ 391. It has recently been decided by the Court of Exchequer, *Kelly*, C. B., dissenting, that where the train, on arrival at the station overshot the platform, by which it was requisite, in order to get out of the car, to make a descent of about three feet, and the plaintiffs (husband and wife), after waiting a short time and seeing no movement to run the cars back, or in any way enable them to remove from the car in any other way, made the descent,

passengers themselves would feel less anxiety, and fatal accidents in consequence would not be likely to occur as they sometimes do.

⁷ *Lucas v. Taunton & New Bedford Railw.*, 6 Gray, 64.

⁸ *Pennsylvania Railw. v. Kilgore*, 32 Penn. St. 292.

⁹ *Pennsylvania Railw. v. Zebe*, 33 Penn. St. 318.

the husband first, and then the wife, standing on the iron step of the carriage and taking both the hands of her husband, jumped down, and in so doing sprained her knee, and the jury having found for the plaintiffs for £300, that a new trial must be granted, on the ground that there was no evidence for the jury of negligence on the part of the defendants.¹⁰

§ 392. Ch. B. *Kelly* maintained, that the stopping of the train at the station, without any notice to the passengers not to get out, was an invitation to them to do so; the descent at that place was dangerous, but not so clearly so that the plaintiffs might not properly encounter the risk; and the company, having wrongfully put the passengers to the necessity of choosing between two alternatives, the inconvenience of being carried on and the danger of getting out, they were liable for the consequence of the choice, provided it were not exercised wantonly or unreasonably. And this seems to us exceedingly just and reasonable, and strictly in accordance with the doctrine of the case of *Foy v. London, Brighton, & South Coast Railway*,¹¹ the facts of which were very similar. We should be surprised if the views of the learned Chief Baron do not ultimately prevail in the appellate courts.

§ 393. But since the foregoing was written, the report of the decision¹² in the Exchequer Chamber has come to hand, and the judgment has been affirmed, with only the dissenting opinion of Mr. Justice *Keating*. The decision here seems to rest mainly upon the rashness, or imprudence, of the party injured, in jumping from the cars, without requesting that they might be pushed back against the platform, or seeking some other mode of alighting, before jumping. It seems to us rather a lame case, and sufficiently apologetic toward railway companies, who leave

¹⁰ *Liner v. Great Western Railw.*, Law Rep. 3 Exch. 150.

¹¹ 18 C. B. (N. S.) 225.

¹² 17 W. R. 417.

passengers to get out of their carriages in the best way they can. If the company are to be excused, when their carriages fall short, or when they overreach the platform at the station, and no effort is made to enable the passengers to alight from them in safety, and passengers are to take the consequences of any accidents occurring from their leaping out, when there is no other means of escape afforded, it comes, practically, very near saying, the company are not responsible for any deficiencies in their accommodations, whenever it is possible to conjecture any mode in which passengers might have escaped injury. We should be surprised to have any such rule of responsibility, on the part of passenger carriers, long prevail anywhere.

§ 394. The true rule in such cases would seem to be, that where any arrangement, connected with passenger transportation was admitted, by being afforded, to be a necessary convenience for the security or comfort of the passengers, it should be the duty of carriers to afford it to all, as far as practicable, and if any injury occurred in consequence of their failure to do so, they should be held responsible, unless the party was in fault. This would ordinarily involve so many inquiries of fact, as to require the case to be submitted to the jury. And the omission to do that seems to be the great ground of doubt in regard to the decision of the case now under consideration. We do not suppose much doubt will arise, upon this point, in the American courts; and we cannot but feel that the strictest and fairest construction of the rules of law requires a question of this character to be submitted to the jury, and therefore, that the dissenting opinions in this case rest upon sounder views than those of the majority. And it was upon this ground, that we ventured to express a hope that the decision would not be maintained by the appellate courts. The case will probably reach the House of Lords, since the decision in the Exchequer Chamber

fails to have the support of either of the Lord Chief Justices, and was dissented from in the first instance by the Lord Chief Baron of the Exchequer, and cannot, therefore, be regarded as of the fullest weight notwithstanding its authority.

CHAPTER IV.

INJURIES PRODUCING DEATH.

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| <p>§ 395. <i>Redress, in such cases, given exclusively by statute.</i></p> <p>§ 396. <i>Form and extent of the remedy under the English statute.</i></p> <p>§ 397. <i>Where the party is in fault, no recovery can be had.</i></p> <p>§ 398. <i>By English courts no damages allowed for mental suffering.</i></p> <p>§ 399. <i>In Pennsylvania, damages measured by probable accumulations.</i></p> <p>§ 400. <i>In Massachusetts, company subjected to fine not exceeding \$5,000.</i></p> <p>§ 401. <i>Wife cannot maintain the action for death of husband, or father, for death of child.</i></p> <p>§ 402. <i>In Illinois, the personal representa-</i></p> | <p><i>tive sues for the benefit of the widow and next of kin. Rule of damages.</i></p> <p>§ 403. <i>Form of the indictment.</i></p> <p>§ 404. <i>If those having charge of passengers, not sui juris, leave them exposed, company not liable.</i></p> <p>§ 405. <i>No action lies if death caused by neglect of fellow-servant or by machinery.</i></p> <p>§ 406. <i>Servant liable for consequences of using defective machinery.</i></p> <p>§ 407. <i>Compensation to the party bars claim of representatives.</i></p> <p>§ 408. <i>Parents may recover for death of child of full age.</i></p> |
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§ 395. WITHIN the last few years, and chiefly it is presumed on account of the increased peril to life by railway travelling, it has been provided by statute, in England and in most of the American States, that redress shall be given against the party causing a personal injury, from which death ensues. These acts, although intended chiefly to stimulate watchfulness and circumspection in passenger carriers, especially carriers by railways and steamboats, are, as was suitable, made general, and in some of the States the recovery is in the form of a penalty.

§ 396. The English statute, usually denominated Lord Campbell's Act,¹ provides that when death shall be caused by wrongful act, neglect or default, such as would (if death had not ensued) have entitled the party to an action, in

¹ 9 & 10 Victoria, ch. 93.

every such case an action may be maintained by the executor or administrator of the party injured, and the jury may give such damages as shall be proportioned to the injury resulting from the death of the party, to his family, to be divided among the parties named in the act, as the jury shall direct. Only one action can be brought, and that is to be commenced within twelve months of the decease of the party injured.

§ 397. It is considered, that if the party's own negligence contributed to the injury, the action will not lie, any more than if the party had survived and brought the action himself.²

§ 398. It has been held that, under the English statute, no damages are recoverable for the mental sufferings of the survivors, who are, by the act, entitled to share the amount recovered, but that the damages must be limited to the injuries of which a pecuniary estimate can be made.³

² Lord *Denman*, Ch. J., in *Tucker v. Chaplin*, 2 Car. & K. 730. A railway company is liable for injuries, resulting from the negligence, violence, or carelessness of its conductors in removing from the car a passenger who refused to pay his fare, in consequence of which he died. *Penn. Railw. Co. v. Vandiver*, 42 Penn. St. 365.

So if the negligence of those who carry the plaintiff contributed to the injury, it is the same thing. *Thorogood v. Bryan*, 8 C. B. 115. Where the deceased was warned of his danger, it is presumptive, but not conclusive evidence of negligence. *North Pennsylvania Railw. v. Robinson*, 44 Penn. St. 175.

³ *Blake, Adm'r, v. Midland Railw.*, 18 Q. B. 93; s. c., 10 Eng. L. & Eq. 437.

Coleridge, J., said: "The important question is, whether the jury, in giving damages apportioned to the injury resulting from the death of the deceased to the parties for whose benefit this action is brought, are confined to injuries of which a pecuniary estimate may be made, or may add a *solatium* to those parties, in respect of the mental suffering occasioned by such death. . . . Our only safe course is to look at the language the legislature has employed. . . . The title of the act is, for compensating families of persons, etc., not for solacing their wounded feelings."

It was argued that the party, had he recovered, would have been entitled to such *solatium*.

"But it will be evident this act does not transfer this right of action to his representative, but gives to his representative a totally new right of action, on different principles." By the terms of the act, quoting the second section, "the measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family." "This language seems more appropriate to a loss

§ 399. In the American courts, the decisions in the different States will differ, as the statutes are different. The of which some estimate may be made, than an indefinite sum, independent of all pecuniary estimate, to soothe the feelings, and the division of the amount strongly tends to the same conclusion. It seems to us that if the legislature had intended to go the extreme length, not only of giving compensation for pecuniary loss, but a *solatium* to all the relations enumerated in the act, language more clear and appropriate for this purpose would have been employed." And because the judge did not limit the damages to the pecuniary loss sustained by the death, a new trial was awarded. *Hodges on Railways*, 624.

There seems no doubt, according to the best-considered cases in this country, the mental anguish, which is the natural result of the injury, may be taken into account, in estimating damages to the party injured, in such cases, although not of itself the foundation of an action. *Canning v. Williamstown*, 1 Cush. 451; *Morse v. Auburn & Syracuse Railw.*, 10 Barb. 623.

But it has been held, that in an action under the English statute to recover damages for the death of a person, the damages are not to be estimated according to the value of deceased's life, calculated by annuity tables, but the jury should give what they considered a reasonable compensation. *Armstrong v. South-eastern Railw.*, 11 Jur. 759.

In the last case cited, *Parke*, Baron, instructed the jury, that they were "to determine, according to the ordinary rules of law, whether, if the deceased had been wounded by the accident, and were still living, he could recover compensation in the way of damages against the company for the wound given, under the circumstances in evidence in the case," and estimate damages "on the same principle as if only a wound had been inflicted."

Another case is very strikingly illustrated, as applicable to the general subject, and the difficulties of laying down any rule in regard to damages in such cases, in an article in the "London Jurist," vol. xviii., part 2, p. 1, for the following extract from which, we refer to the editor's note to *Carey v. Berkshire Railw.*, 1 Am. Railw. Cas. 447.

The writer in the "Jurist" says: "On the 15th of December, 1852, the case of *Groves v. The London & Brighton Railw. Co.*, was tried at Guildhall, in the Court of Common Pleas, before *Jervis*, Ch. J. That was an action brought by the executor of the deceased, for the benefit of four infant children. That the deceased had met with his death through the negligence of the defendants' servants was admitted, the only question being the amount of damages. In summing up, the learned chief justice referred to the case of *Blake v. London and Brighton Railw. Co.*, and told the jury that in assessing the damages they might take into consideration any injury resulting to the children from the loss of the care, protection, and assistance of their father. The jury gave £2,000. Now, if the argument *ab inconvenienti* was permitted to prevail against the allowance of compensation for the mental anguish of the relatives, it ought not, we submit, to be without weight in considering the soundness of this direction. Juries have no small difficulties to contend with in assessing damages, when they have before them evidence of the average profits, or the amount of the life income of the deceased; but these are but trifling to those in which they must become entangled in attempting a *pecuniary*

rule laid down in *Pennsylvania*⁴ is, that the jury are to estimate damages "by the probable accumulations of a estimate of the loss of the care, protection, and assistance of a father. In whatever light we look at the subject, either of money or morals, we become perplexed in the attempt to pursue it. It is conceived that in such cases evidence may be given of the character of the deceased, and in many cases this would doubtless be of a most painful nature.

"Moreover, serious practical difficulties would arise. Let us suppose, that, through the negligence of a pointsman, — in the belief of his employers a trustworthy servant, — an accident happens to a train containing the six following fathers: An archbishop, a lord chancellor, an East Indian director, a lunatic, a wealthy but immoral man, and one virtuous but a bankrupt. It is needless to dilate on the difficulties which juries would experience if called upon to estimate the pecuniary value of the parental care, protection, and assistance of each of these."

In a late English case serious doubts are suggested whether an action will lie, under the English statute, to recover damages in the name of the administrator, for the death of an infant (so young as to be unable to earn anything), by way of compensation for the loss of the services of the child to the family. *Bramhall v. Lee*, 29 *Law Times*, 111. In *Dalton v. Southeastern Railw. Co.*, it was held, that the father might have an action, under Lord Campbell's Act, 9 & 10 Vic. ch. 93, for an injury resulting in the death of a son, twenty-seven years old and unmarried, who had been accustomed to make occasional presents to his parents, on account of the reasonable expectation of pecuniary profit from the continuance of his life, and of that expectation being disappointed. But it was held not competent for the jury to give, by way of damages, compensation for the expenses incurred by him for his son's funeral, or for family mourning. 4 C. B. (N. S.) 296. Nor can damages be awarded as a *solatium*, or in respect of the loss of a legal right, but on the ground of a reasonable expectation of pecuniary advantage from the continuance of the life. It is not necessary that actual benefit should have been derived; but reasonable expectation of sensible and practical pecuniary benefit is sufficient. *Franklin v. same Co.*, 3 H. & N. 211; s. c., 31 *Law Times*, 154. But in the case of *Oldfield v. New York & Harlem Railw.*, 3 E. D. Smith, 103, it is said that the New York statute, giving a right of action in this class of cases to the next of kin, does not limit the amount to be recovered to the loss of those only whose relations to the deceased gave them a legal right to some pecuniary benefit, which would result from the continuance of the life. An action will lie in every such case, under the statute, where the deceased, had he survived, could have maintained one. The damages are not restricted to the actual pecuniary loss, but include present and prospective damages, in the dis-

⁴ *Penn. Railw. Co. v. McClosky*, 23 *Penn. St.* 526, 528. The court say: "The jury must place a money value upon the life of a fellow-being, very much as they would upon his health or reputation." In the trial of such an action, it is proper for the judge, in charging the jury, to allude to the expectation of life at certain ages, as determined by tables, deduced from the bills of mortality. *Smith v. N. Y. & Harlem Railw.*, 6 *Duer*, 225; *City of Chicago v. Major*, 18 *Ill.* 349.

man of such age, habits, health, and pursuits, as the deceased, during what would probably have been his lifetime."

§ 400. By the statute of Massachusetts,⁵ passenger carriers, causing the death of any passenger through their own negligence or carelessness, or that of their servants or agents, within the Commonwealth, are subjected to a fine, not exceeding five thousand dollars, to be recovered by indictment to the use of the executor or administrator of the deceased person, "for the benefit of his widow and heirs."

§ 401. It was held that the wife cannot sustain an action for the death of her husband, under this act.⁶ Nor can the father sustain such action for the loss of service of his child, by death.⁷ Nor in either of the last two cases will an action lie at common law.^{6 and 7}

§ 402. By the statute of Illinois the right of action in such cases is given to the personal representative, and the damages recovered are for the exclusive benefit of the

cretion of the jury. Accordingly, in the present action, brought for the benefit of the mother of an infant daughter, seven years of age, killed in the streets of New York by one of defendants' cars being drawn over her, it was held that a verdict for \$1300 did not justify the court in granting a new trial, the amount, although "large, not affording evidence of prejudice, partiality, or corruption." This case is affirmed in the Court of Appeals, 4 Kernan, 310, upon the ground that the question of negligence was properly submitted to the jury, and that no proof of special or pecuniary damage was necessary, in order to maintain the action. In a case in California, *Fairchild v. California Stage Co.*, 13 Cal. 599, it is held that damages for pain of mind ("mental anguish") are recoverable.

⁵ March 23, 1840. Proceedings under this act are not within the statute of limitations for actions, and suits for penalties. *Commonwealth v. Boston & Worcester Railw.*, 11 Cush. 512. It has been held that in proceedings under this statute it must be alleged, that administration has been taken within the Commonwealth. *Commonwealth v. Sanford*, 12 Gray. 174.

⁶ *Carey v. Berkshire Railw.*, 1 Cush. 475. And under the New York statute, giving an action to recover the pecuniary injury to the wife and next of kin, if there be no wife or next of kin, no action will lie. The husband cannot recover damages for the death of the wife. *Lucas v. N. Y. Central Railw.*, 21 Barb. 245; *Worley v. Cincinnati, Hamilton, & Dayton Railw.*, 1 Handy, 481.

⁷ *Skinner v. Housatonic Railw.*, 1 Cush. 475.

widow and next of kin, and the jury are to give damages for the pecuniary injury to such parties. It was held not necessary to the recovery, that the widow and next of kin should have had any legal claim upon the deceased for their support, if he had survived.⁸ It was here said by Mr. Justice *Nelson*, that the damages must depend very much upon the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case. Where the action is by the husband as administrator of his wife, where the damages are for the next of kin, the services of the wife and mother, in the nurture and instruction of her children, had she survived, may properly be brought to the consideration of the jury by the judge in his charge,⁹ and the consideration is not necessarily to be restricted to the minority of the children.

§ 403. In an indictment under this statute, it is not necessary to specify the names of the servants or agents guilty of the negligence, or the nature or manner of such negligence.¹⁰

⁸ *Railroad Co. v. Barron*, 5 Wallace, 90. And by the New York statute it is not requisite to the recovery that there should be "a widow and next of kin" surviving the deceased party. *McMahon v. New York*, 33 N. Y. 642. The New York statute does not apply to a cause of action in tort accruing in a foreign state, and no action will lie thereon in New York, when the death of the party ensues. *Crowley v. Panama Railw.*, 30 Barb. 99. In *Balt. & Ohio Railw. v. State*, 24 Md. 271, the rule is thus stated. In an action for negligently causing the death of plaintiff's husband, an instruction that "in the absence of proof (other than the death, age, and condition of the deceased, and of the members of the family of the deceased, of actual damages, the jury could find only nominal damages:" was held rightly refused. The jury were instructed to confine themselves to such damages as would afford to the family of the deceased the same support they would have obtained from his labor during the time he would probably have lived and earned a livelihood, but that they might consider the age, health, and occupation of the deceased, and the comfort and support afforded to the family of the deceased at the time of his decease." Held correct.

⁹ *Tilley v. Hudson River Railw.*, 29 N. Y. 252.

¹⁰ *Commonwealth v. Boston & Worcester Railw.*, 11 Cush. 512. In an action upon the statute of Massachusetts, 1842, c. 89, § 1, which provides that "the action of trespass on the case for damage to the person shall hereafter survive, so that in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended, by or against his execu-

§ 404. The want of care in the deceased, which contributed to produce the injury, we have seen, will preclude the recovery of damages, under the statutes, allowing actions to be maintained in those cases where the party does not survive the injury. So, also, in the case of persons incapable of taking care of themselves, if those who have the custody of them improperly expose them, and injury ensues, causing death, the company are not liable, although guilty of negligence. Where a lunatic was travelling in the cars, upon a railway, in charge of his father, who had paid the fare of himself and son through, and taken tickets, but who got out at a station to procure refreshments, leaving the son in the cars, without giving notice to any one of his situation, the train left the station before he returned. The conductor applied to the lunatic for his ticket, not knowing his condition, or that his fare had been paid. The lunatic not surrendering his ticket, the conductor stopped the train and had him put out, where he was killed by another train. It was held, that no action could be maintained against the company, under the statute, the fault being upon the part of those who were responsible for the deceased, and not on that of the company, or its agents.¹¹

tors or administrators, in the same manner as if he were living," it was held that the right of action depended on the question, whether the testator, or intestate, lived after the act which constitutes the cause of action. *Shaw*, Ch. J., said: "If the death was instantaneous, and of course simultaneous with the injury, no right of action accrues to the person killed; and of course none to which the statute can apply. But if the party survives, lives after it, the right of action accrues to him as a person *in esse*, and his subsequent death does not defeat it, but by operation of the statute, vests it in the personal representative." *Hollenbeck, Adm'r. v. Berkshire Railw.*, 9 Cush. 481. See also *Mann v. Boston & Worcester Railw.*, *id.* 108. Where the party was by the injury rendered immediately insensible and died in fifteen minutes thereafter, the cause of action was held to survive to the personal representative. *Bancroft v. Boston & Worcester Railw.* 11 Allen, 34.

¹¹ *Willetts v. N. Y. & Erie Railw.*, 14 Barb. 585. See also *Hibbard v. N. Y. & Erie Railw.*, 15 N. Y., 455. But the admissions of a deceased husband against the interests of the wife, in an action for personal injury to her, brought, after

§ 405. Nor does an action lie, under these statutes, where the death is caused by the negligence of a fellow-servant, unless such servant was habitually careless and unskillful; or if produced in the use of defective machinery, which the deceased knew to be unsafe.¹² Nor where the death is caused by defective machinery, or through defect of fences, if the servant knew of the defect, and made no remonstrance.¹³

§ 406. And it has even been considered in such case, that the servant, being an engineer, would be liable to any person injured by such defect.¹³

§ 407. Where the deceased in his lifetime received a sum of money in satisfaction of the injury, his subsequent death in consequence of the injury, creates no new cause of action.¹⁴

the death of the husband, in her own name, such admissions being made after the alleged injury occurred, and while the husband, had a suit been instituted, must have been joined, are nevertheless inadmissible, on the ground that the husband is not the real but only a nominal or formal party. *Shaw v. Boston & Worcester Railw.*, 8 Gray, 45; *ante*, pt. iii. ch. ii., n. 1, 2.

¹² *Hubgh v. New Orleans & Carrollton Railw.*, 6 Louis. Ann. 495. See 1 Redf. Railw. § 131, n. 2, 9, 10; *Timmons v. Central Ohio Railw.*, 6 Ohio (N. S.) 105.

But if the servant object to the use of machinery, as unsafe, and it is still used, whereby he loses his life, damages may be recovered under the statute. *Marshall v. Stewart*, 2 McQu. Ho. Lds. 30; s. c., 33 Eng. L. & Eq. 1.

¹³ *McMillan v. Saratoga & Wash. Railw.*, 20 Barb. 449. It is here said, the servant may require special indemnity against all risks, or he may give notice to the company, and throw the risk upon them. See *Slattery's Adm'r. v. T. & W. Railw.*, 23 Ind. 81, where it is held, that

A brakeman on a train, and one whose duty and business it is to attend a switch, are engaged in the same general undertaking, and the company are not liable to one for an injury caused by the negligence of the other.

The complaint stated in substance that A. was brakeman on a freight-train of defendants, and was killed by the cars being thrown off the track by the breaking of a switch-pin, which the company and their servants, knowing it was insecure, had carelessly left out of repair for twelve days previous. There was no switch-tender, and the whole care of the switch, and everything pertaining to its security, was under the control of the section-agent and his hands, who had nothing to do with running the trains.

Held, that in the absence of an averment that the company were negligent in employing an incompetent section-agent, the complaint did not sufficiently state a case of negligence against the company.

¹⁴ *Read v. Great Eastern Railw.*, Law Rep. 3 Q. B. 555.

§ 408. Where the deceased was over twenty-one years old, but having made arrangements to become a substitute for a drafted man had declared his intention of giving his bounty to his parents, and was killed on his way to be mustered into the service, it was held that these facts were proper evidence to show the continuance of the family relation, and to found an action by his parents.¹⁵

¹⁵ *Pennsylvania Railway v. Adams*, 55 Penn. St. 499.

CHAPTER V.

SUITS WHERE THE INJURED PARTY IS A MARRIED WOMAN.

§ 409. <i>In a suit by husband for injury to the wife he may recover the expenses of the cure.</i>	§ 410. <i>But such expenses cannot be recovered in a suit on behalf of the wife for her personal injuries.</i>
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§ 409. FOR injuries to a married woman through the negligence of railways, as passenger-carriers, the husband may recover for expenses of the cure, and the loss of service,¹ and in one case it was held to extend to funeral expenses, as well as medical attendance, where the wife did not recover; but if death be instantaneous, no action lies at common law.²

§ 410. But in a suit in the name of husband and wife, where the wife survives, a recovery cannot be had for the expenses of cure.³ In such action recovery can only be had for the personal injury and sufferings of the wife. The action in such case, for the loss of service, and of the society of the wife, and for the expenses of the cure, must be brought in the name of the husband alone,⁴ unless where they have been charged upon the separate estate of the wife.⁵

¹ *Pack v. Mayor of New York*, 3 Comst. 489. And see *Ford v. Monroe*, 20 Wendell, 210, where it is held the father may recover for killing his child, and for medical attendance upon his wife, the mother, caused by the death of the child.

² *Eden v. Lexington & Frankfort Railw.*, 14 B. Monr. 204.

³ *Fuller & Wife v. Naugatuck Railw.*, 21 Conn. 571.

⁴ Cases cited above, 1, 2, 3.

⁵ *Moody v. Osgood*, 50 Barb. 628.

CHAPTER VI.

LIABILITY, WHERE TRAINS DO NOT ARRIVE IN TIME.

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| <p>§ 411. <i>Company liable to deliver passenger according to contract.</i></p> <p>§ 412. <i>May excuse themselves by special notice.</i></p> <p>§ 413. <i>Liable for damages caused by discontinuance of train.</i></p> <p>§ 414. <i>Carriers not performing according to previous notice liable to all injured, as for breach of duty.</i></p> <p>§ 415. <i>Not liable for injury caused by stage company, connecting with railway.</i></p> | <p>416. <i>Company excused, by giving proper notice of the course of their trains and the places of changing cars.</i></p> <p>§ 417. <i>Rule of evidence and of estimating damages in such cases.</i></p> <p>§ 418. <i>In order to recover special damages in such case it must appear clearly that they occurred and were inevitable.</i></p> |
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§ 411. It would seem, upon general principles, that railways should be liable for not delivering passengers within the stipulated time, as much as for not delivering goods according to their undertaking, unless they can show that such contract is subject to some exception which existed in the particular case. And in the county courts in England, it is said such actions have repeatedly been maintained.¹

§ 412. But if the company give proper notice, that they will not be responsible for the arrival of their trains in time, it would seem they are not liable.

§ 413. But where they advertise to run trains in a given mode, they are liable for any injury, which one who took an excursion ticket sustained, by not finding a return train

¹ *Hodges on Railways*, 619. It was held in the U. S. Circuit Court, September, 1856, before *Nelson, J.*, that where one sold tickets to carry passengers from Panama to San Francisco, and stipulated that the ship should leave on her trip in the month of April, 1850, he must run all hazards of wind and weather, and could not excuse himself on account of any accidental or providential occurrence of that kind, having made no such exception in his contract. 19 *Law Rep.* 379.

on the day it was advertised, he having returned by express, and sued the company for the expense.²

§ 414. And it has been said, that the liability of a pas-

² *Hawcroft v. Great Northern Railw.*, 16 Jur. 196 ; s. c., 8 Eng. L. & Eq. 362. See also *Denton v. Great Northern Railw.*, 5 El. & Bl. 860 ; s. c., 34 Eng. L. & Eq. 154, where it is held that a railway company, continuing to advertise on their time-tables that a train will leave a station at 7.20 and arrive at another point beyond their line at 12, after this connecting train is discontinued, and by consequence their own train of that hour, whereby one suffers pecuniary loss, in not being able to proceed by such train, and thereby being delayed in his arrival in season for his business, is liable to an action for such injury.

But in the case of *Hamlin v. Great Northern Railw.*, 1 H. & N. 408 ; s. c., 38 Eng. L. & Eq. 335, the plaintiff took passage in a train which was advertised to go through the same night to the point of his destination, by connecting with the trains of another company, and it proved, on arriving at the point of connection, that the other train had left. The plaintiff was compelled to stay over night, and proceeded the next morning, having to purchase a new ticket for the remainder of the route, and did not arrive till one o'clock the next day. When he took defendants' train, he paid for and took a ticket through, and, by the time-tables advertised in defendants' office, he should have arrived at his destination 9.30 P. M., having taken the train at 2 P. M.

The plaintiff might have accomplished his journey that night, by taking a special conveyance and hiring a boat to cross the Humber, but he slept at a hotel, and proceeded the next morning by the public conveyance, but arrived too late to meet his customers according to appointment, and was obliged to hire conveyances to see some of them elsewhere, and was detained several days, waiting for the market days, to see others. It was held that he was only entitled to recover his hotel expenses, and the railway fare the next day, and was not entitled to recover for any damage whatever in consequence of not reaching his destination, according to defendants' undertaking. This case seems to have taken rather an extreme view of the rule of damages on this subject. The very least the defendants could have expected to pay for the breach of duty should have been, it would seem, the expense of a special conveyance through that night. The rule here adopted seems to be almost equivalent to a denial of all beneficial redress in such cases. For it is scarcely to be supposed that actions would ever be brought to recover such insignificant damages. It is quite supposable that one might suffer very serious loss in consequence of such a failure to arrive in time, and if an action is maintainable, it should not be made a terror by attaching to it a rule of damages which will render it as expensive to the plaintiff as to the defendants, who are solely in fault. It seems also at variance with some former decisions in the English courts. See cases above in this note. We conjecture that this rule will not be ultimately followed in the courts of Westminster Hall. *Martin*, Baron, who tried the case at *Nisi Prius*, seems to have placed it upon the ground, that the defendants, having no knowledge of plaintiff's business, or its necessities, could not fairly be supposed to have undertaken to indemnify him against this loss. But the learned judge conceives the defendants may stand upon the terms

senger carrier for not stopping at a certain place and taking passengers, according to public announcements made known through the public prints, or in writing, is one founded upon a tortious violation of a general duty, and not upon any breach of special contract. And the courts, from the general facts alleged in the declaration, will put such a construction upon the plaintiff's claim as is consistent with the facts and the legal duty resulting from established legal principles.³ Common carriers of passengers

of their contract. But he seems altogether to overlook the fact, that it was not the fault of the passenger that the company did not understand the necessities of his business. He would no doubt have readily disclosed such facts upon proper inquiry. And are the company to be benefited by their own reserve upon this point? The true rule would seem to be that the passenger is entitled to such damages as naturally resulted from the facts known to himself, and upon the basis of which he purchased his ticket. And if the plaintiff, instead of remaining over night, had gone forward the same night, as he might have done, and as by the contract he was entitled to do, the defendants would have been liable for the additional expenses. This may perhaps be the more just and practicable rule, in cases where the party had ample time to proceed by express in season for his appointments. But if, instead of doing so, he delays for the next train, and thereby suffers damage beyond what would have been necessary to defray the expense of going forward according to the contract, we see no reason why the company should not, at all events, bear that portion of the loss which was necessarily incurred in consequence of their breach of contract.

No question is made in the case in regard to the special damage not being specifically declared for. If that question had been made, there might have been some ground for saying that it did not come within the general averments found in the declaration, which is the only ground upon which it seems to us the case can be made to stand with the earlier English cases upon the subject. *Hutchinson v. Granger*, 13 Vt. 386; *ante*, 1 Redf. Railw. § 131, n. 14. In the later case of *Randall v. Roper*, 9 El. & Bl. 84; S. C., 31 Law Times, 81, the defendant sold the plaintiff a spurious article, warranted as "chevalier seed barley"; the plaintiff resold to others with similar warranty; the seed was sour and very inferior crops grown. The sub-purchasers made claims upon the plaintiff for breach of warranty, but brought no actions, nor had the plaintiff paid anything at the time of trial. It was held the plaintiff could recover such sum as the jury thought reasonable to indemnify him against the claims of sub-purchasers. This seems a more reasonable rule of damages than some of the preceding. But where the sale on warranty and consequent responsibility for damages are not in the contemplation of the parties at the time of the first sale, no such damage could be recovered. *Portman v. Middleton*, 4 C. B. (N. S.) 322.

³ *Heirn v. McCaughan*, 32 Miss. 17; *New Orleans, etc. Railw. v. Hurts*, 36 id. 660.

who write to the postmaster to give notice of the arrival of their boat upon a certain day thereafter named, and who do not stop at the place upon the day appointed, are guilty of a breach of public duty, and any one suffering loss thereby may have an action. And if such letter is equivocal, it is competent to show by evidence *abunde*, as by the circumstances under which the letter was written, and the business in which the company were employed, that it had reference to coming to the place named on the day appointed, for passengers.⁴

§ 415. But the company, advertising that stages will run from their stations to other places off the line of the railway, and selling tickets at their stations for such places, that is, to carry upon the railway to the nearest stations and then by stage, will not render the company liable for any injury to such passenger upon the stage, after he leaves the railway, the company having no ownership, or interest in the stages. This does not constitute a special contract to carry, as far as the ticket reaches.⁵ But the facts are certainly very analogous to many cases, where a special contract has been held to exist, in regard to carrying goods beyond the line of the carrier to whom first delivered.⁶

§ 416. Where the company give such published notice of the running of their trains, and such special notice in the cars of the necessity of changing cars at any particular station, that any traveller of ordinary intelligence, by the use of proper care, would be in no danger of mistaking his route, it will not be liable where passengers mistake the place of changing cars, and by remaining in the same car are carried out of their intended route.⁷

⁴ *Heirn v. McCaughan*, *supra*.

⁵ *Hood v. N. Y. & N. H. Railw. Co.*, 22 Conn. 1.

⁶ *Ante*, pt. ii. ch. xv. But in Connecticut it has been held, that such a contract by a railway company is *ultra vires*. *Ante*, pt. ii. ch. xvi.

⁷ *Page v. New York Central Railw.*, 6 Duer, 523. If the passenger in such case having discovered the mistake in season to return and take the proper route,

§ 417. In an action against passenger carriers, for not furnishing suitable accommodations; for delay and detention in the route; and for expense of injury and sickness caused thereby in an unhealthy climate; it was held unobjectionable for the judge to admit evidence of how much the plaintiff was exposed to the sun and rain, and the nature of the climate, in order to enable the jury to determine how far the plaintiff's sickness was caused by the defendant's negligence. And that in estimating the damages it was proper for them to consider the time the plaintiff lost by the sickness, his expenses caused thereby, not only before but after his return home, so far as it resulted from the defendant's fault.⁸ And the plaintiff may prove his skill, as a bookkeeper, and by parity of reason, in any other profession, to enable the jury to estimate his loss.⁹

§ 418. In order to enable the plaintiff to recover special damages claimed to have been sustained by reason of the failure of the defendant to perform promptly, and according to its terms, a contract to carry him as a passenger, it must appear clearly, and by affirmative proof, that the

and is permitted to do so without charge, but refuses to leave the cars, or pay his fare on the route he is travelling, he may be expelled from the cars.

⁸ *Williams v. Vanderbilt*, 28 N. Y. 217. The point is thus stated in the report of the case. In an action against a common carrier of passengers to recover damages for the failure of the defendant to carry the plaintiff from New York to San Francisco via Lake Nicaragua, according to his agreement; for neglect of duty in not providing suitable accommodations, etc., for delay and detention on the route, and for sickness caused by unnecessary detention in an unhealthy climate, etc.; held that it was entirely proper for the judge to receive evidence as to how much the plaintiff was exposed to the sun and rain while crossing the Isthmus, and to show that the climate there was bad and unhealthy, so that the jury could determine whether the plaintiff's sickness was caused by defendant's negligence and breach of duty.

Held also that the time the plaintiff lost by reason of his detention on the Isthmus, his expenses there and of his return to New York, the time he lost by reason of sickness after his return to New York, and the expenses of such sickness, so far as the same were caused by defendant's negligence or breach of duty, were legitimate damages which plaintiff was entitled to recover.

⁹ *Yonge v. Pacific Mail Steamship Co.*, 1 Cal. 353.

damages were sustained, without any fault on his part, and in spite of his utmost efforts to avoid them.²⁰

¹⁰ *Benson v. New Jersey Railway & Transp. Co.*, 9 Bosw. 412. The point is thus stated in the report of the case: In an action against a carrier of passengers, to recover damages for a failure to carry the plaintiff within the appointed time, to the place for which he had taken passage, by reason whereof he did not perform his errand there, and was detained at expense and to the injury of his business at home, he must produce some evidence that if he had arrived at the appointed time he could have done his business and would have promptly returned, or that he could not, with due effort, accomplish his errand by reason of the delay in arriving. Nor can the plaintiff, in such action, recover for his expenses and the damages to his business during a sojourn of several days, without some proof as to the time when he first ascertained that he could not accomplish his errand and might therefore return.

The fact that his errand was to receive a sum of money previously promised him as a loan, and that, not receiving it, he was without means to defray the expenses of returning until he received it, is not sufficient to excuse his delay, if he made no effort to borrow, and does not show that there was any difficulty in the way of his doing so.

CHAPTER VII.

WHAT WILL EXCUSE COMPANY FROM CARRYING PASSENGERS.

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| <p>§ 419. <i>Company not bound to carry where carriages full.</i></p> <p>§ 420. <i>But must carry according to terms which they advertise.</i></p> <p>§ 421. <i>Not bound to carry disorderly passengers, or those otherwise offensive.</i></p> | <p>§ 422. <i>Carrier liable in tort for breach of duty aside from any contract.</i></p> <p>§ 423. <i>Purchase of ticket does not constitute a contract.</i></p> <p>§ 424. <i>Company has a right to impose reasonable regulations as to carriage of passengers.</i></p> |
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§ 419. It would seem, upon general principles, that railway companies might excuse themselves from carrying passengers beyond their present means, if they were adequate to all ordinary occasions, and they had no reason to expect an increased press of travel at that particular time. But it should undoubtedly be an extreme case, to justify an absolute refusal to carry a passenger, since it could scarcely be supposed ever to occur, that a railway, in any sense properly equipped for the purpose of carrying passengers and freight, should not be able to meet all emergencies in some way. And if the occasion were unusual, it might excuse some discomfort in the mode of conveyance.

§ 420. But it is said by *Patteson, J.*, in one case, where the company had issued an excursion ticket, stipulating to run trains in a given mode, that they could not excuse themselves, by showing the carriages were all filled.¹ The

¹ *Hawcroft v. Great Northern Railw.*, 16 Jur. 196; s. c., 8 Eng. L. & Eq. 362. In regard to the general duty and liability of common carriers of passengers, or those who held themselves out as such, see 1 Redf. Railw., § 131. It is said to

learned judge said: "They should have made it a condition of their contract, that they would not carry unless there was room." By the by-laws established by the Board of Trade, in regard to railways in England, every passenger is required to book his place and pay his fare when he receives his ticket, and this is subject to the condition that there shall be room in the train, for which he is booked. If not, those booked for the greatest distance have the preference.²

§ 421. But it has never been considered in this country, that passenger-carriers in any mode were bound to receive passengers who refused to conform to their reasonable regulations, or were not of quiet and peaceful behavior, or for any reason not fit associates for the other passengers, as if infected by contagion, or in any way offensive in person or conduct.³ But where the carrier of passengers has no reasonable excuse, he is bound ordinarily to carry all that offer.⁴ And this has been regarded as a duty, growing out of the employment of common carriers of passengers, and altogether independent of the contract between the

have been held by some court, in the case of *Foland v. Hudson River Railw.*, that a passenger who is not furnished with a seat is not obliged to pay fare, and if he is expelled from the cars for refusing such payment may sustain an action against the company. Such a rule must require much qualification. If the passenger is not accommodated in a manner which he deems a fair compliance with the duty of the company as passenger-carriers, he may decline any compromise and resort to his action against the company for refusing to carry him, as their contract by the ticket or their duty required. And he might, no doubt, sustain such action, unless the company proved some just excuse. But if he chooses to accept of a passage without a seat, the general understanding undoubtedly is, that he must pay fare. But if he goes upon the cars expecting proper accommodations, and is put off because he declines going in that mode, he may still resort to his action.

² *Hodges on Railways*, 553; 1 *Redf. Railw.*, § 26, n. 6.

³ *Jencks v. Colman*, 2 *Sumner*, 221; *Markham v. Brown*, 8 *N. H.* 523. In these cases the persons excluded were in the interest of rival lines of carriers, and at the time engaged in the promotion of such interests.

⁴ *Hollister v. Nowlen*, 19 *Wendell*, 239; *Bennett v. Dutton*, 10 *N. H.* 486, where the subject is very elaborately and satisfactorily discussed by Mr. Ch. Justice *Parker*. *Galena & Chicago Railw. v. Yarwood*, 15 *Ill.* 472.

parties, but which may undoubtedly be controlled by contract.⁵

§ 422. The liability of a common carrier results from his duty to carry all freight and passengers which offer within the range of his usual business, and he is liable in tort both in form and in substance as for a breach of duty aside from and independent of all express or implied contract.⁶

§ 423. The mere purchase of a ticket for a railway journey does not amount to a contract on the part of the company, or impose upon the company a duty to have a train ready to start at the time the passenger is led to expect one.⁷

§ 424. And a railway company have the right to prescribe reasonable conditions for the admission of any passengers on their freight trains; and the payment of fare to its office agents, or procuring a ticket before taking passage on such trains, is not an unreasonable condition.⁸ An offer to pay fare to an employee on the train, not author-

⁵ *Bretherton v. Wood*, 3 Bro. & Bing. 54; s. c., 9 Price, 408.

⁶ *Tattan v. Great Western Railw.*, 2 El. & El. 844. But a master cannot recover of the company for the loss of service of his servant when the servant purchased the ticket. *Alton v. Midland Railw. Co.*, 19 C. B. (N. S.) 213; s. c., 11 Jur. (N. S.) 672.

⁷ *Hurst v. Great Western Railw.*, 19 C. B. (N. S.) 310; s. c., 11 Jur. (N. S.) 730. This was where the trains did not connect by reason of the train on the first portion of the line being delayed, and the passenger thereby being put to expense in staying over night, and it was held there was no absolute contract to make the connection, and the passenger must run the risk of reasonable contingencies. The time-bills here were not put in the case, and the court held that the ticket alone only bound the company to carry the passenger through in a reasonable time. The time-bills will bind the company to their fulfillment. *Ante*, pt. iii., ch. vi., n. 2.

But where the company state in their bills that all reasonable effort will be made to have trains arrive as advertised, but punctuality will not be guaranteed, and the jury find the company guilty of no negligence, the passenger cannot recover for any failure to arrive in the time named in the bills and time-table. *Prevost v. Great Eastern Railw.*, 13 L. T. (N. S.) 20, before *Crompton, J.*, at *Nisi Prius*.

⁸ *The Cincinnati, Columbus, & Cleveland Railw. v. Bartram*, 11 Ohio (N. S.) 457.

ized to receive it, is not an offer to the company, and in such cases does not entitle the party to a place on such train as a passenger.⁸ And when a person has purchased a ticket and taken his passage on a train, and given up his ticket to the conductor, he cannot at an intermediate station, by virtue of his subsisting contract, leave such train, while in the reasonable performance of the contract, and claim a seat upon another train.⁸

CHAPTER VIII

RULE OF DAMAGES FOR INJURIES TO PASSENGERS.

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| <p>§ 425. <i>All damage, present and prospective, is recoverable.</i></p> <p>§ 426. <i>But these should be obvious, and not merely conjectural.</i></p> <p>§ 427. <i>New trials allowed for excessive damages.</i></p> <p>§ 428. <i>But this only allowed in extreme cases.</i></p> <p>§ 429. <i>Counsel fees not to be considered.</i></p> <p>§ 430. <i>Some English judges doubt if damages should be claimed as compensation for pain.</i></p> <p>§ 431. <i>Not so viewed generally.</i></p> <p>§ 432. <i>Plaintiff may show value of his time lost.</i></p> <p>§ 433. <i>Generally rests very much in discretion of jury.</i></p> <p>§ 434. <i>In actions for loss of service, cannot include mental anguish.</i></p> | <p>§ 435. <i>Woman claiming damages for personal injury cannot prove state of her family or death of husband.</i></p> <p>§ 436. <i>Refusal of court to set aside verdict for excessive damages.</i></p> <p>§ 437. <i>The right to damages question of law; the amount, one of fact.</i></p> <p>§ 438. <i>Chief Baron Pollock's commentary on these questions.</i></p> <p>§ 439. <i>Special damages cannot be recovered unless alleged and proved.</i></p> <p>§ 440. <i>Plaintiff who claims damages for loss of time and business may prove nature of business and probable profits.</i></p> <p>§ 441. <i>Mother recovers pecuniary loss, by death of infant child during minority, but nothing for shock to feelings.</i></p> |
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§ 425. THE question of damages is one resting a good deal in the discretion of a jury, and must of necessity be more or less uncertain. But certain general rules have been established upon the subject. It is decided that the party must recover all his damages, present and prospective, in one action.¹

§ 426. But in another case,² it was said by the court, "It

¹ *Hodsoll v. Stallebrass*, 11 Ad. & Ellis, 301; *Whitney v. Clarendon*, 18 Vt. 252; *Curtis v. Rochester & Syracuse Railw.*, 20 Barb. 282; *Black v. Carrollton Railw.*, 10 Louis. Ann. 33.

² *Curtis v. Rochester & Syracuse Railw.*, 20 Barb. 282. See also *Morse v. Auburn & Syracuse Railw.*, 10 Barb. 621.

In the case of *Hopkins v. Atlantic & St. Lawrence Railw.*, 36 N. H. 9, it was held, that in an action by the husband for an injury to the wife, through the

was certainly proper for the jury, in estimating the damages to the plaintiff, to regard the effect of the injury in future, upon her health, the use of her limbs, her ability to labor and attend to her affairs, and generally to pursue the course of life she might otherwise have done," and its effect in producing bodily pain and suffering, but all these should be "the legal, direct, and necessary results of the injury, and those, which at the time of the trial were prospective, should not be conjectural."

§ 427. Courts will sometimes grant new trials for excessive damages in such cases, as where the statute limited the amount of recovery in case of death to \$5,000, and the jury assessed damages in a case of injury, not resulting in death, at \$11,000, the court ordered a new trial, unless the excess above \$5,000 should be remitted in twenty days.³

§ 428. The rule laid down by *Kent*, Ch. J., as justifying a new trial for excessive damages is, that they should be so excessive "as to strike all mankind, at first blush, as beyond all measure unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, corruption, or prejudice."⁴ This is no doubt a safe rule, and perhaps the only safe one in such

negligence of the company, the plaintiff may give evidence of expense of cure and loss of services, after the commencement of the action, as well as before; and the jury may give prospective damages also. The jury may also give exemplary damages, in their discretion, where the injury was caused by the gross negligence of the company in the management of their trains.

³ *Collins v. Albany & Schen. Railw.*, 12 Barb. 492. So where six thousand dollars was awarded for a broken leg, of which the party recovered in about eight months, a new trial was granted. *Clapp v. Hudson River Railw.*, 19 Barb. 461. But where the plaintiff had been disabled for two years, and the injury seemed likely to be permanent, \$4,500 was held not exorbitant. *Curtis v. Rochester & Syracuse Railw.*, *supra*.

And where the plaintiff was wrongfully expelled from the cars, between regular stations, and the jury gave \$1,000 damages, a new trial was granted on the ground they were excessive, no special damage being shown. *Chicago, Burlington, & Quincy Railw. v. Parks*, 18 Ill. 460.

⁴ *Coleman v. Southwick*, 9 Johns. 45. See also *Southwick v. Stevens*, 10 Johns. 443.

cases, but there are probably many cases where new trials have been granted for this cause, falling far short of this in excessiveness.

§ 429. In some of the American States, in trials at *Nisi Prius*, in conformity with a single English case, the plaintiff has been allowed to add to his actual damages of loss of time, expense of cure, pain, and suffering, and prospective disability, if any, — counsel fees not recoverable by way of taxable costs.⁵ But this does not seem to be countenanced by the English courts in the later decisions.⁶

§ 430. In a recent English case, a distinguished judge, Ch. B. *Pollock*, says: "A jury most certainly have a right to give compensation for bodily suffering unintentionally inflicted. But when I was at the bar I never made a claim in respect of it, for I look on it not so much as a means of compensating the injured person, as of damaging the opposite party. In my personal judgment it is an unmanly thing to make such a claim. Such injuries are part of the ills of life, of which every man ought to take his share."⁷

§ 431. The principle of this remark seems to be conceived in a more philosophic and Christian temper than would be altogether consistent with bringing any action at all. But it is sometimes refreshing to find minds soaring above the dead level of pecuniary equivalents to which the profession are for the most part doomed, in connection with estimating the damages to be awarded for personal

⁵ *Shaw*, Ch. J., in *Barnard v. Poor*, 21 Pick. 381. But this rule is here condemned, and also in *Lincoln v. Saratoga & Sch. Railw.*, 23 Wend. 435.

⁶ *Grace v. Morgan*, 2 Bing. (N. C.) 534; *Jenkins v. Biddulph*, 4 Bing. 160; *Sinclair v. Eldred*, 4 Taunt. 7. The only English case where this claim is countenanced, is *Sandback v. Thomas*, 1 Stark. 306. See *Webber v. Nicholas*, 1 Ryan & M. 419.

⁷ *Theobald v. Railway Passengers' As. Co.*, 10 Exch. 45 s. c., 26 Eng. L. & Eq. 438. But see *Curtis v. Rochester & Syracuse Railw.*, 20 Barb. 282, where the rule of the American law upon the subject is fully stated, as cited in the text (2). Damages arising from this source need not be specially stated in the declaration, unless of an unusual and unexpected character. *Ib. Ante*, pt. ii. ch. xi., n. 14; pt. ii., ch. xiv., n. 2.

injuries. But it has always been held in this country, that the bodily pain and suffering caused by an injury for which one party is legally entitled to claim compensation of the other, were legitimate elements to be proved and considered by the jury in estimating the pecuniary compensation which they shall award, notwithstanding the difficulty of reducing pain and pence to a common measure.⁸

§ 432. It has been held the plaintiff might give evidence of the nature of his business and the value of his services in conducting it, as a ground of estimating damages by an injury through the negligence of the company, but not the opinion of witnesses as to the amount of his loss.⁹

§ 433. In actions against carriers of passengers for injuries, there seem, as we have said, to be no well-defined rules for estimating damages. It is a matter to be submitted to the sound discretion and judgment of the jury who are to consider the actual loss to the plaintiff, present and prospective, which is the very lowest amount they will feel justified in giving in any case. Beyond this any rule for damages must be regarded as more or less *terra incognita*. There is no doubt juries often give damages altogether beyond any actual damage which it is supposed the party has sustained in a pecuniary point of view. And it is not uncommon, in charging juries upon this subject, to bring their attention, in considering the question of damages, to the degree and character of the misconduct of the defendants or their agents, and even to the public example of the trial and verdict. This has been sometimes seriously criticised by elementary writers, and sometimes, as we have seen, by judges, but we find no cases where new trials have been granted on account of such suggestions having been given in charge to the jury. And when it is considered that verdicts in civil actions are the only effect-

⁸ *Ransom v. New York & Erie Railw.*, 15 N. Y. 415; *Penn. Railw. v. Allen*, 53 Penn. St. 276.

⁹ *Lincoln v. Saratoga & Sch. Railw.*, 23 Wend. 425.

ual corrective of a most flagrant disregard of human life, which often occurs in the transportation of passengers, we are not prepared to say that the jury are bound altogether to shut their eyes to the public example of their verdicts.¹⁰

§ 434. In an action¹¹ by the father for loss of service from an injury to his infant son fourteen years of age, it was held that no damages could be given for the shock to the father's feelings, that being a proper consideration only in an action in the name of the son for the direct injury.¹¹

§ 435. In an action in favor of a woman for damages sustained by the negligence of a railway company at a road-crossing, the death of plaintiff's husband by the same accident, or the fact that she has dependent children, is not admissible in evidence to increase the damages.¹²

§ 436. Where in such case the plaintiff lost one arm and the use of the other, and was otherwise severely

¹⁰ *Farish v. Reigle*, 11 Grattan, 697.

¹¹ *Black v. Carrollton Railw.*, 10 Louis. Ann. 33. And in the case of *Coakley v. North Pennsylvania Railw.*, 10 Am. Railw. Times, No. 12, 6 Am. Law Reg. 355, tried in the city of Philadelphia, for the death of a child fourteen years of age, by a collision of trains upon defendants' road, the court adopted a similar view in regard to the rule of damages. They said it was not a case for exemplary damages; the jury were to take into consideration the pecuniary services of the child until of age, and the expense incurred by the plaintiff after the accident, and the value of the society of the child, which might be regarded as the strongest claim. But they were not to consider the anguish of the parents, nor were they to inquire what a man would take for a child, for this would be speculative damages, and in this view, the value of human life is beyond all price.

The rule thus laid down is perhaps about as accurate as any one could give. But it is evident it will not bear strict analysis. For how can one estimate the value of the society of a child to a parent and not consider the mental anguish consequent upon the death. It is the same thing under different forms of speech.

All that can properly be said is, that the question of damages, within reasonable limits, rests entirely in the discretion of the jury. They are to be watchful that their verdict shall not be so inadequate to the injury as to appear like a denial of justice, nor so extravagant as to indicate that they have assumed the office of avengers of the plaintiff's wrongs, without due consideration of any apology for the defendants' conduct, which to some extent exists in all cases.

¹² *Shaw v. Boston & Worcester Railw.*, 8 Gray, 45.

bruised and injured, so as greatly to impair health and memory, and be in constant pain, and she had at three successive trials recovered \$10,000, \$18,000, and \$22,250, respectively, the two first of which were set aside for errors in law, the court refused to set aside the third verdict on the ground that the damages were excessive.¹²

§ 437. There is a recent case¹³ in the Court of Exchequer, where the question of the remoteness of damage recoverable in open actions is very carefully considered and judiciously treated. *Pollock*, Ch. B., said, "We apprehend where the facts are known, it is the province of the court to say for what matters damages are to be given; but the amount of damage is a question for the jury quite as much as the credit due to the witnesses.

§ 438. The learned judge here passes a most unqualified encomium upon *Hadley v. Baxendale*,¹⁴ as having been most carefully considered and wisely determined, and as having settled all questions coming within the range of its compass. The words of his lordship in regard to the proper province of a jury in determining a question of damages, and the proper latitude to be allowed them, are worthy of repetition here, and of grave consideration and remembrance wherever they have any just application.

§ 439. In actions against common carriers, only such damages as necessarily result from the wrongful act can be recovered, unless special damages are alleged and proved.¹⁵ Consequently, where an unmarried woman received serious injury by the upsetting of a passenger-carriage, through the want of due care on the part of the carrier, it was held that no additional damages could be awarded on account of lessened prospect of marriage thereby, such damages not being specially claimed in the decla-

¹² *Wilson v. Newport Dock Co.*, 4 H. & C. 232; s. c., Law Rep., 1 Exch., 177; 12 Jur. (N. S.) 233.

¹⁴ 9 Exch. 341.

¹⁵ *Hunter v. Stewart*, 47 Me. 419.

ration or sustained by the evidence ; upon either of which grounds the recovery was equally precluded.¹⁵

§ 440. It is generally permitted for the plaintiff who claims to recover for loss of time, or loss of business, to prove the nature and extent of his business, and the probable profits arising therefrom, in order to enable the jury to form a correct estimate of his loss.¹⁶

§ 441. Where the mother is to be compensated for the injury or loss consequent upon the death of her infant child, the shock or suffering of feeling is not to be taken into the account, but only the pecuniary loss, and that is not to be extended beyond the minority of the child.¹⁷ But the limitation of damages to the minority of the child seems very questionable. The exclusion from consideration in estimating damages, of the suffering of feelings of the mother, has been usual under the English statute, and most of the American statutes are copied from that.

¹⁵ *Hanover Railw. v. Coyle*, 55 Penn. St. 396. See also *Hyatt v. Adams*, 16 Mich. 180; *McIntyre v. N. Y. Central Railw.*, 37 N. Y. 287.

¹⁷ *State v. Baltimore & Ohio Railw.*, 24 Md. 84 ; *ante*, pt. iii. ch. iv.

CHAPTER IX.

CARRIERS OF PASSENGERS AND GOODS CANNOT DRIVE WITHIN THE
PRECINCTS OF A RAILWAY STATION.

§ 442. WE shall show hereafter that it is competent for railways to make by-laws regulating the conduct of passengers, and the use of stations, and other matters concerning the traffic.¹ It seems to be considered by the English courts, that even in a case where passengers, by the existing statutes and by-laws of the company applicable to the subject, have the right to insist upon coming upon the grounds adjoining the stations of the company, and even where the company generally allow omnibus-drivers and other passenger carriers to come within the precincts of their stations without objection, that a particular carrier of passengers, who was excluded from this privilege, had no ground of action against the company on that account.²

¹ *Post*, pt. iii. ch. xvi., xvii., xviii. ; 1 Redf. Railw., §§ 26, 27, 28.

² *Barker v. Midland Railw. Co.*, 18 C. B. 46 ; s. c., 36 Eng. L. & Eq. 253. This case is put by the court upon the ground of want of privity in contract, and also, that the grounds adjoining railway stations are not dedicated to public use in any such sense as to become a public highway for carriages.

The 2d section of the English "Railway and Canal Traffic Act, 1854," 17 & 18 Vict. c. 31, provides, that railway companies shall afford reasonable facilities for receiving and forwarding traffic, without any preference or advantage to particular persons. The court in this case intimate, that even if the company are liable, under this act, for the injury here complained of, the party must pursue the specific remedy given by the statute. *Willes, J.*, said : "The action is founded upon the supposed duty of the defendants to let the plaintiff come on their lands, and it is suggested that the duty arises from the fact of their allowing the public generally to come on it; but it is not stated that the defendants have dedicated the place to the public use, so as to make it public. Then it is said that it is the duty of the defendants, as carriers, to allow persons to bring passengers and goods into the station. But it would be rather extraordinary, if a

But in a later case,³ where one was so excluded from driving his omnibus upon the grounds of the company in the same manner as other carriers of a similar character were allowed to do, no special circumstances being shown to justify the particular exclusion, it was held that the court, under the English Railway Traffic Act, might enjoin the company to admit the person excluded with his vehicle in the same manner and to the same extent to which they admitted others of a similar description. But the companies are not in England prohibited from giving a preference to certain cab-owners, either for compensation or other consideration, to come within their grounds, and excluding others.⁴ The complaint must come from those who use the railway, and be a *bonâ fide* complaint on behalf of the public interest.⁵

person, to whom no direct duty was due by the company, could maintain an action, when the passengers could not, because it is not averred that they were ready and willing to pay the fare, which is essential. *Pickford v. Grand Junction Railw. Company*, 8 M. & W. 372. But the action is not maintainable, also, on another ground. A third person cannot bring an action for the result of a breach of duty towards another person. The last case of that kind was where a passenger, by a coach, brought an action against the coach-maker for a breakdown. If such actions were permitted, the courts would be inundated with them."

³ *Marriott v. London & Southwestern Railw.*, 1 C. B. (N. S.) 499; s. c. 40 L. & Eq. 250.

⁴ *Beadell v. Eastern Counties Railw.*, 2 C. B. (N. S.) 509.

⁵ *Painter v. London, Brighton, & South Coast Railw.*, id. 702.

CHAPTER X.

DUTY RESULTING FROM THE SALE OF THROUGH PASSENGER TICKETS, IN THE FORM OF COUPONS.

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| <p>§ 443. <i>Not the same as where goods and baggage are ticketed through.</i></p> <p>§ 444. <i>It is to be regarded as a distinct sale of separate tickets for different roads. They may be used when the holder elects.</i></p> <p>§ 445. <i>The first company are to be regarded as agents for the others.</i></p> <p>§ 446. <i>If the business of the entire line is consolidated, it is different.</i></p> <p>§ 447. <i>But in general it is not regarded as a case of partnership.</i></p> | <p>§ 448. <i>The companies being in different States and kingdoms makes no difference.</i></p> <p>§ 449. <i>First company held liable for baggage not checked.</i></p> <p>§ 450. <i>So for an injury, occurring on another line, over which they had sold tickets.</i></p> <p>§ 451. <i>A stage route intersected by a ferry, hired to carry the coaches over, is responsible for the safety of passengers on the ferry.</i></p> |
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§ 443. As the general duty of common carriers of passengers is different from that of common carriers of goods, so the implied contract, resulting from the sale of through tickets for passengers is different. In the case of carriers of goods, and the baggage of passengers, we have seen that taking pay and giving tickets or checks through, binds the first company ordinarily for the entire route.¹

§ 444. But in regard to carrying passengers the rule is different, we apprehend. These through tickets, in the form of coupons, which are purchased of the first company, and which entitle the person holding them to pass over successive roads, with ordinary passenger baggage, sometimes for thousands of miles, in this country import, commonly, no contract with the first company to carry such person beyond the line of their own road. They are to be regarded as distinct tickets for each road, sold by the

¹ *Ante*, pt. ii. ch. vi., vii.; *McCormick v. Hudson River Railw.*, 4 E. D. Smith, 181.

first company, as agents for the others, so far as the passenger is concerned; and unless the first company check the baggage beyond their own line, it is questionable, perhaps, how far they are liable for losses happening beyond their own limits.² And where a person procured a ticket in coupon form, over two distinct railways, and delayed two months at the end of the first railway, before resuming his journey, it was held, that being printed on separate pieces of paper and containing no restrictions, they were to be regarded as separate vouchers or contracts for distinct passages, and the delay did not affect the rights of the holder.³ We apprehend that this is the general understanding in regard to the rights of the holders of such tickets. The only question which could fairly occur in case of any considerable delay between the different lines would be that it might justify requiring some explanation.

§ 445. And the contract which exists between the companies, commonly, in regard to the division of the price of the through tickets, constitutes no such partnership as will render each company liable for injuries or losses occurring upon the whole route. The first company is, in such case, viewed as the agent of the other companies, and the transaction requires no different construction from one where the tickets of one company are sold at the stations of other companies, which is not very uncommon, and would never be regarded in any other light than that of agency merely.² But the passenger taking separate tickets, for different portions of the line, will not preclude him from showing, by oral proof, that the contract with the first company ex-

² *Sprague v. Smith*, 29 Vt. 421; *Hood v. New York & New H. Railw.*, 22 Conn. 1; s. c., id. 502. When this case last came before the court, held, that the defendants were not estopped from denying that under their charter they had power to enter into a contract to carry passengers beyond their own road. But in this respect the case stands alone, probably, at present. See *Ellsworth v. Tartt*, 26 Ala. 733; *ante*, pt. ii. ch. vi., vii.; *Straiton v. New York & New H. Railw.*, 2 E. D. Smith, 184. In this last case it was held, that each company is only liable for the losses on its own line.

³ *Brooke v. Grand Trunk Railw.*, 15 Mich. 332.

tended to the entire route. And this may also be established by circumstances attending the transaction.⁴

§ 446. We are aware that in regard to consolidated lines of travel, consisting of different companies, or natural persons, originally, where the entire fare is divided ratably, and all losses are deducted, it has been held to constitute such a partnership as to render them all liable to third persons.⁵

§ 447. But in a recent case, where the subject seems to have been a good deal examined, the rule is thus laid down: ⁶ "If the several proprietors of different portions of a public line of travel, by agreement among themselves, appoint a common agent at each end of the route to receive the fare and give through tickets, this does not of itself constitute them partners, as to passengers who purchase through tickets, so as to render each one liable for losses occurring on any portion of the line."

§ 448. Contracts made in this mode are binding upon all the companies, and it will make no difference that they are in different states or kingdoms.⁷ And if one carrier so issue his tickets, or in other respects so conduct, as to have purchasers understand that he undertakes personally for the entire route, he will be held responsible to that extent.⁸

⁴ *Van Buskirk v. Roberts*, 31 New York, 661.

⁵ *Champion v. Bostwick*, 11 Wend. 572; s. c., 18 Wend. 175. See also *Carter v. Peck*, 4 Sneed, 203.

⁶ *Ellsworth v. Tartt*, 26 Ala. 733. And a similar rule is adopted in *Briggs v. Vanderbilt*, 19 Barb. 222, in regard to passenger transportation between New York and San Francisco, the line consisting of three independent companies, who had no common interest in the business throughout the route, although they advertised together, as one line. And in this case, where the defendant gave the plaintiff a ticket for a passage by a particular ship, which had already been wrecked, without the knowledge of either party, it was held the defendant was liable for the money received for the ticket, in an action for money had and received, as for the failure of the consideration for which the payment was made. See also *Northern Cent. Co. v. Scholl*, 16 Md. 331.

⁷ *Cary v. Cleveland & Toledo Railw.*, 29 Barb. 35.

⁸ *Quimby v. Vanderbilt*, 17 N. Y. 306. His being an owner in the different portions of the route, and advertising it as his route, are circumstances justly tending to show a personal undertaking for the entire route.

§ 449. And where an excursion ticket is issued in Boston by a railway company terminating there, marked "from Boston to Montreal," with coupons attached for the connecting roads, marked in the same manner, the passenger purchasing the same, and delivering his baggage to the agent of the first company and demanding a check, the agent refusing to give the check, but giving assurances that such baggage would be perfectly safe, as he, the baggage-master, was going through the entire route, was held by the Supreme Judicial Court of Massachusetts, entitled to recover for the loss or non-delivery of such baggage at the termination of the route.⁹

§ 450. In a recent English case,¹⁰ where the first company sold a ticket through an entire line, composed of different companies worked in connection, and the same carriage going through, it was held they thereby assumed the responsibility of assuring the track to be kept in working condition throughout the entire route; and where the passenger was injured upon the track of another company, by the train coming in collision with a stationary engine left on the track by the servants of that company, without any fault of the driver of the train, it was held the first company were responsible.

§ 451. Where a line of passenger transportation by stage coaches was intersected by a ferry not belonging

⁹ *Najac v. Boston & Lowell Railw. Co.*, 7 Allen, 329.

¹⁰ *Great Western Railw. Co. v. Blake*, 7 H. & N. 987; s. c., 8 Jur. (N. S.) 1013. In this case the plaintiff purchased a ticket in London and paid one fare to Milford in Pembrokeshire, and took one ticket for the entire route, as is the English custom. The line of the Great Western Company, of whom the plaintiff purchased his ticket, extends a short distance beyond Gloucester, and from thence to Milford the line belongs to the South Wales Company. By arrangement between the two companies the line is worked together and the fares divided between them. The plaintiff was conveyed by the same carriage until he entered upon the line of the second company, when it came into collision with an engine left upon the track, by the servants of the latter company. There was no negligence on the part of the driver of the train. It was held that the first company was responsible to the plaintiff, since under the circumstances there was an implied obligation on their part to maintain the whole line in a fit condition for safe passage.

to the passenger carriers, but hired to carry their coaches over, it was held the stage company were responsible for the negligence or misconduct of the ferry company and its servants, as being, for the time, their agents and servants.¹¹

¹¹ *McLean v. Burbank*, 11 Minn. 277.

CHAPTER XI.

HOW FAR THE DECLARATIONS OF THE PARTY ARE COMPETENT EVIDENCE.

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| <p>§ 452. <i>Are competent to show state of health, in connection with other facts.</i></p> <p>§ 453. <i>But not to show the manner in which the injury occurred.</i></p> | <p>§ 454. <i>Exposition of the just application of the rule admitting declarations as part of the res gestæ.</i></p> |
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§ 452. IN trials for injuries to passengers, it has been allowed to show the plaintiff's complaints of the state of his health, and that he has not labored at his trade, being poor, and having a considerable family.¹ And statements made by a patient to his physician, for the purpose of receiving medical advice, in regard to the character and seat of his sensations, have been held competent evidence in his favor, in an action to recover damages for the personal injury which was the alleged cause of the malady or illness, even where such statements were made preceding the action.²

§ 453. But in practice at *Nisi Prius*, it has generally been considered inadmissible to show the statements of the party injured, in regard to the manner in which the

¹ *Caldwell v. Murphy*, 1 Duer, 233; s. c., 1 Kernan, 416; 1 Greenleaf, Ev., § 102; *Aveson v. Kinnaird*, 6 East, 188; *Bacon v. Charlton*, 7 Cush. 581. In an action for damage sustained through defects in a highway it is not competent for the plaintiff to give evidence of his declarations to his physician, in regard to the cause of the injury for which the physician was consulted. *Chapin v. Marlboro*, 20 Law Rep. 653, in Supreme Court of Massachusetts. Nor in an action for damages, by reason of collision between two carriages upon the highway, can the plaintiff give evidence of the declarations of defendant's servant, that the plaintiff was not in fault, made at the time of the accident, and while the defendant was being extricated from the carriage. *Lane v. Bryant*, 20 Law Rep. 653.

² *Barber v. Merriam*, 11 Allen, 322.

injury occurred, as, for instance, the manner of driving, or the rate of speed, the declaration of the party being competent only as to invisible and insensible effects of the injury, such as bodily and mental feelings, which are of necessity shown by the usual and only modes of expression applicable to the subject.¹

§ 454. But the declarations of the engineer having charge of the train, and made at the time an injury occurs, have been received as evidence in an action for negligence against the company, as part of the *res gestæ*.³ There can be no doubt of the soundness of this general proposition. But we think courts and text writers are very much in danger of extending the rule to declarations, made at the *time* of the transaction although forming no part of it. The declaration to constitute a part of the transaction must not only be made at the time the event is transpiring, but it must be made for the purpose of qualifying or giving character to some act then doing, and unless it is of this latter character it is no more admissible for being made at the time of the transaction than if made at any other time. And such it seems to us was the character of the declarations of the engineer that the train arrived at the crossing behind time, which were admitted in this case.⁴

³ Hanover Railw. v. Coyle, 55 Penn. St. 396.

⁴ 1 Greenleaf, Ev., § 108 & n. § 108 a.

CHAPTER XII.

PASSENGERS WRONGFULLY EXPELLED FROM CARS.

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| <p>§ 455. <i>Company not held liable for exemplary damages unless they ratified the expulsion.</i></p> <p>§ 456. <i>But upon principle the company should be liable for special damage.</i></p> <p>§ 457. <i>Are trespassers if they refuse to deliver baggage in such cases.</i></p> <p>§ 458. <i>Company must keep strictly to the terms of any by-law regarding the production of tickets when called for.</i></p> <p>§ 459. <i>Conductors bound to exclude disorderly or offensive persons.</i></p> | <p>§ 460. <i>One wrongfully expelled from the cars, not entitled to special damages, unless it occurs clearly without his fault.</i></p> <p>§ 461. <i>Where ticket lost person liable to pay fare.</i></p> <p>§ 462. <i>One wrongfully put on shore, by a passenger boat, short of his destination, may show, to enhance damages, that it was done in an insulting manner.</i></p> |
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§ 455. It has been held that a passenger who was wrongfully expelled from the company's cars, after having surrendered his ticket, the conductor not crediting his statement, was not entitled to recover vindictive or punitive damages against the company, unless they expressly or impliedly participated in the tortious act, authorizing it before or approving it after it was committed.¹

¹ *Hagan v. Providence & Worcester Railw.*, 3 Rhode Island, 88. This was an action on the case, and the rule of damages given to the jury, approved in the Superior Court was, "That all damages for actual injury, loss of time, pain of body, money paid for employment of physician, or injury to the feelings of defendant, might be allowed." This is as far as most cases go, in this form of action, unless in slander and libel; and it has been seriously questioned, how far damages in any case should be given for exemplary or punitive purposes. But in practice, that has more commonly been allowed, when the party acts in bad faith, and from feelings of vindictiveness. And in the case of railway companies, who are incapable of such motives personally, it is rather intimated, in the case cited above, that they would never be liable for such damages, unless upon some formal ratification of the act of their agent. But, upon principle, it would seem that if

§ 456. But no doubt if one were put out of the cars wrongfully, and thereby suffered serious detriment in his business, he might be entitled to recover special damages, but not probably without declaring specially in regard to such damages.

§ 457. Where a ship-owner refused to carry a passenger, whom he had engaged to carry, and proceeded on the voyage without giving the passenger reasonable opportunity to remove his baggage, or with the intent to carry it beyond his reach, it was held, that he thereby terminated the contract of carriage, and was liable in trespass.²

§ 458. Where the company have a by-law or regulation by which passengers are bound to produce their tickets when required so to do, they must bring themselves strictly within the terms of the by-law. And where the by-law provided that no passenger should enter any carriage of the company, or ride therein without first paying fare and procuring a ticket, which he is to show when required, and to deliver up before leaving the carriage, and the master procured tickets for himself and his servants, which were allowed to enter the carriages upon the master telling the guard he had tickets for them, without the servants being required to produce them, each for himself, it was held the master might recover for the

the agent was so situated as to represent the company in the particular transaction, and for the time, they should be liable to the same rule of damages as the agent, although the form of action may be different.

If the act is that of the company, they should be held responsible for all its consequences, and there seems quite as much necessity for holding the company liable to exemplary damages as their agents. It is difficult to perceive why a passenger, who suffers indignity and insult from an inexperienced or incompetent conductor of a train, should be compelled to show the actual ratification of the act of the conductor, in order to subject the company to exemplary damages, if the transaction was really of a character to demand such damages, and the company are liable at all. It would rather seem that the reasoning of the court carried to its full extent, would show that the conductor, in that portion of his conduct which was tortious, did not represent the company at all. Upon the same principle it was at one time held, that a corporation is not liable to indictment for the misfeasance of its agents. 2 Redf. Railw., § 225.

² Holmes v. Doane, 8 Gray, 328.

expulsion of the servants for not producing their tickets.³

§ 459. The conductor of a street railway car may exclude or expel from the car, any person, who by reason of intoxication or otherwise is in such a condition as to render it reasonably certain, that his presence or continuance in the vehicle would create inconvenience or disturbance, or cause discomfort and annoyance to other passengers.⁴ It is the duty of such passenger carriers to take all reasonable and proper means to insure the safety, and provide for the comfort and convenience of their passengers, and for that purpose to repress and prohibit all disorderly conduct in the cars, and to expel or exclude therefrom persons whose conduct or condition is such as to make acts of impropriety, rudeness, indecency, or disturbance either inevitable or probable; and the conductor is not bound to wait until some act of violence, profaneness, or other misconduct has been committed, to the inconvenience or annoyance of other passengers, before exercising his authority to exclude or expel the offender.⁵

§ 460. Where one gave half his ticket to another to enable him to ride upon it, and was expelled from the cars on the ground that he had not paid his fare, and left a pair of opera glasses behind, in the carriage, without asking to have them taken out, he was held not entitled to recover the value of the same, as special damages resulting from the assault.⁶

§ 461. Where a season ticket was issued upon the condition that it should be shown to the conductor when demanded, and that no duplicate should be issued, and the

³ *Jennings v. Great Northern Railw. Co.*, Law Rep. 1 Q. B. 7; s. c., 13 Law T. (N. S.) 231. See also *Dearden v. Townsend*, Law Rep. 1 Q. B. 10; s. c., 13 Law T. (N. S.) 323.

⁴ *Vinton v. Middlesex Railway*, 11 Allen, 304.

⁵ *Bigelow*, Ch. J., in *Vinton v. Middlesex Railw.*, 11 Allen, 306.

⁶ *Glover v. London & Southwestern Railw.*, L. R. 3 Q. B. 25.

same was accidentally lost, so that the holder could not produce it, he was held liable to pay fare.⁷

§ 462. It has been held, that where a passenger is put on shore short of the port of destination under circumstances of indignity and insult calculated to wound his sensibility, he is entitled to show the circumstances of his disembarkation and the language used by the captain, as a ground for enhancing damages.⁸

⁷ *Ripley v. New Jersey Railw.*, 30 N. J. 388.

⁸ *Coppin v. Braithwaite*, 8 Jur. 875.

CHAPTER XIII.

PAYING MONEY INTO COURT, IN ACTIONS AGAINST PASSENGER
CARRIERS.

§ 463. <i>Payment into court in general count and tort, only admits damages to extent of sum paid.</i>	§ 464. <i>But in cases of special contract, admits the contract and breach al- leged.</i>
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§ 463. WHERE a declaration in tort is general, and without specification of the particulars of the cause of action, the payment of money into court admits a cause of action, but not the cause of action sued for, beyond the amount paid into court, and the plaintiff must give evidence before he is entitled to damages, beyond the amount paid into court.

§ 464. But if the declaration be specific, so that nothing is due, unless the defendant admits the specific claim in the declaration, the payment of money into court admits the cause of action sued for,¹ both the contract and the breach of it.

¹ *Perren v. Monmouthshire Railw. and Canal Co.*, 17 Jur. 532 ; s. c., 20 Eng. L. & Eq. 258. The declaration here stated a contract to carry plaintiff from N. to E., and a negligent breach of duty in the performance of it, and damages. Plea, payment of £25 into court. Replication, damages *ultra*. Held, the negligence was admitted, and the plaintiff was entitled to recover all damages proved, even beyond the £25, without introducing proof to show defendant guilty of negligence on his part.

The general subject of the effect of paying money into court will be found examined to some extent in *Hyde v. Moffatt*, 16 Vt. 286; *Bacon v. Charlton*, 7 Cush. 581. See also, upon this general subject, *Stapleton v. Nowell*, 6 M. & W. 9; *Fischer v. Aide*, 3 M. & W. 486; *Story v. Finnis*, 6 Exch. 123 ; s. c., 3 Eng. L. & Eq. 548.

CHAPTER XIV.

LIABILITY WHERE ONE COMPANY USES THE TRACK OF ANOTHER.

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| <p>§ 465. <i>Statement of the facts of a case.</i></p> <p>§ 466. <i>Company not liable to occasional passengers on freight trains for torts committed by employees of other roads.</i></p> <p>§ 467. <i>Same liability toward passengers coming from other roads as in other cases.</i></p> | <p>§ 468. <i>And owe passengers same duty upon other roads as their own.</i></p> <p>§ 469. <i>Railway responsible, on other roads, to same extent as the owners.</i></p> <p>§ 470. <i>Responsibility measured by law applicable to case.</i></p> |
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§ 465. In a recent case, the plaintiff had employed the defendants to transport cattle from Vermont to Boston, by their trains. By the custom of defendants, the plaintiff was allowed to go as a passenger, in a saloon car attached to the cattle train, without additional charge, to enable him to look after the cattle. The train, in its passage, went over the Northern New Hampshire Railway, that company furnishing the motive power, with their engineer and fireman, but the defendants' conductor continuing with this train through the route. While the train was passing over the Northern New Hampshire Railway, without any fault of those who had the management of it, but through the sole negligence of the other servants and employees of the Northern New Hampshire Railway, the saloon car, which carried the plaintiff, was broken in by a collision with another train going in the same direction, and the plaintiff seriously injured.

§ 466. It was held, that the undertaking of the defendants, in regard to carrying plaintiff, was of a limited and special character, and did not render them responsible for

injuries which he might sustain by the misconduct of other parties;¹ that the plaintiff being aware, from the very nature of the transaction, that he would be exposed to perils of this character, must be supposed to undertake, upon his own part, to sustain that hazard, and could not justly be allowed to throw it upon an innocent party, who was known to him, at the time of entering into the contract, to have no control over the persons causing the plaintiff's injury.² And this case may be maintainable upon this latter ground, and the peculiar circumstances of the undertaking, but probably not upon general principles applying to passenger-carriers.³

§ 467. In a recent case in Massachusetts, it was held, that a railway company, which receives the cars of another company upon its track, placing them under the control of its agents and servants, and drawing them by its locomotive power, assume towards the passengers the common

¹ *Sprague v. Smith*, 29 Vt. 421. It was argued in this case, that, as the defendants' contract bound them absolutely to carry the freight, and the plaintiff went, as incidental to the main contract, the same kind of liability should be assumed in regard to him, if not to the same extent. But the plaintiff can in no sense be regarded otherwise than as a passenger. The same rule applies to agents and servants, and to negro slaves. *United States v. The Thomas Swan* (Dist. Court of U. S. Dist., South Carolina), before *Magrath, J.*, 19 Law R. 201. There is the same difference between the liability of carriers always, for the person of a passenger and for his baggage. In the case of *Sullivan v. Philadelphia & Reading Railw.*, 6 Am. Law Reg. 342; s. c., 30 Penn. St. 234, it is decided, that a railway company cannot excuse themselves as carriers of passengers where injury occurs in consequence of cattle straying upon the track, through defect of fences, which, as to the owners of the cattle, the company were not bound to maintain, because such act is a trespass against the company. It is the duty of the company to exclude cattle from their track for the security of their passengers. But this rule would not probably be extended to such acts of trespass as no reasonable foresight or caution could have anticipated or guarded against. *Ante*, § 127, n. 5.

² *Bridge v. Grand Junction Railw.*, 3 M. & W. 244; *Thorogood v. Bryan*, 8 C. B. 115, 129. But the carrier is himself responsible for the acts and neglects of all persons, natural or corporate, who are employed in carrying out his undertaking, and they are, *pro hac vice*, his servants. *Ryland v. Peters, Wallace, Philadelphia*, 264.

³ *Post*, § 468 and n. 5.

liability of passenger-carriers,⁴ and that it makes no difference, in regard to the liability of the company, to passengers passing over their road, whether they purchase tickets of them, or of any other railway company or agent, authorized to sell such tickets.⁴

§ 468. But the rule of law in regard to passenger-carriers who run over other roads than their own, seems now to be pretty well established, that the first company is responsible for the entire route, and must take the risk of the negligence of the employees of the other companies.⁵

§ 469. And in one case where cattle were injured by a train run by a company other than the owners of the line, running thereon by permission of the owners, and the animals came upon the track through defect of fences, which it was the duty of the owners of the line to build, it was held that the company running the train were responsible for the injury although the owners of the line might also have been responsible for the same.⁶

§ 470. Where a company took leave to run upon the line of another company under the general railway law of the State, by means of a lease of the second company, which was organized under the general railway law, the former company acting under a special statute, it was held that the responsibility of the first company in running the second company's road must be determined by the provisions of the general railway law and not by the special charter of the first company.⁷

⁴ Schopman v. Boston & Worcester Railw., 9 Cush. 24.

⁵ Railway Co. v. Barron, 5 Wall. 90; *ante*, ch. x. § 450 and note. See Ayles v. Southeastern Railw., Law Rep. 3 Exch. 146.

⁶ Ill. Central Railw. v. Kanouse, 39 Ill. 272.

⁷ McMillan v. Mich. Southern & Northern Ind. Railw., 16 Mich. 79.

CHAPTER XV.

HOW THE LAW OF THE PLACE GOVERNS.

§ 471. Corporations are only liable according to <i>lex loci</i> .		goods under a special contract from a foreign country.
§ 472. This in conformity with the general law.	§ 475. But in the absence of special contract the laws of the country to which the ship belongs will govern.	
§ 473. Corporations must be judged by local law.	§ 476. Where a collision occurred in a British port, the rights of parties will be settled by the law of that country.	
§ 474. It was left to the jury to say what was reasonable as to the time of shipping		

§ 471. CORPORATIONS, as we have seen,¹ can only act in conformity with the law of the state or sovereignty by which they are created. It must follow, by parity of reason, that such corporations are responsible, as carriers, only to the extent and in conformity to the law of the state or jurisdiction where the contract is made or the duty undertaken. And it will make no difference whether the action is in form *ex contractu* or *ex delicto*.

§ 472. This is in conformity to the general rule of law upon the subject of contracts and torts. Thus, in a very recent English case² in the Exchequer Chamber, where the subject is considerably discussed with reference to torts committed abroad, it was held, that an action will lie in the common-law courts of the realm, in respect of an assault or other tort committed by one English subject against another English subject beyond the realm, provided that the foreign law prevailing on the spot gave compensation or damages for the offense to the party injured.

¹ *Ante*, § 17 a.

² Lord Seymour v. Scott, 9 Jur. (N. S.) 522; s. c., 1 H. & C. 219; 8 Jur. (N. S.) 568.

§ 473. So that, most unquestionably, where railway corporations are sued out of the jurisdiction by which they were created, and under whose laws alone they can act, the extent and degree of their responsibility must be determined by the law of the place of the existence and action of such corporation.

§ 474. And on a contract made in a foreign country with carriers to transport goods to this country, and alleged breach of duty by negligence in causing an injury to them in that country, no question of the *lex loci* being raised, upon the express contract and evidence of the course of business there, and other facts in the case, it was left to the jury to form a judgment whether there had been such negligence as to cause a breach of duty, and what would be reasonable under the circumstances.³

§ 475. So too where the contract of affreightment does not provide otherwise, it has been held, that in respect of sea damage and its incidents, including liabilities on a bottomry bond, the law of the country to which the ship belongs must govern.⁴

§ 476. And where a collision between American vessels occurred in a British port, the rights of the parties depend upon the British statutes or laws there in force, and if doubts exist as to their true construction, our courts will adopt that which is sanctioned by the courts of Great Britain.⁵

³ *Cohen v. Gaudet*, 3 F. & F. 455. And in this case, where there was an express contract to send goods into England, the jury were told that meant in a reasonable time, and that the default of carriers by sea employed by them to carry the goods would be no excuse for a delay to ship them in a reasonable time, or for damage done on the quay or on the passage, which might have been avoided by reasonable despatch.

⁴ *Lloyd v. Guiburt*, Law Rep. 1 Q. B. 115.

⁵ *Smith v. Condry*, 1 How. (U. S.) 28.

CHAPTER XVI.

POWER OF RAILWAY CORPORATIONS, AS PASSENGER-CARRIERS, TO MAKE BY-LAWS OR STATUTES.

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| § 477. <i>May control conduct of passengers.</i> | § 483. <i>Company may demand higher fare if paid in cars.</i> |
| § 478. <i>Must be reasonable and not against law.</i> | § 484. <i>Public statutes control by-laws.</i> |
| § 479. <i>Power may be implied, where not express.</i> | § 485. <i>Cannot impose penalty.</i> |
| § 480. <i>Not required to be in any particular form unless by special provision.</i> | § 486. <i>Cannot refuse to be responsible for baggage.</i> |
| § 481. <i>English railways have power to enforce by-laws by penalty and imprisonment.</i> | § 487. <i>Statutes operate upon members from promulgation and upon others from time of knowledge of the same.</i> |
| § 482. <i>Model code of by-laws framed by Board of Trade in England.</i> | § 488. <i>Regulations for the accommodation of passengers, during the passage, must yield to the right of others to be carried.</i> |

§ 477. It is incident to all corporations to enact by-laws or statutes for the control of their officers and agents, and to regulate the conduct of their business generally. And in the case of railways this includes the regulation of the conduct of passengers and others who are in any way connected with them in business, although not their agents.

§ 478. This power is subject to some necessary limitations. Such by-laws must not infringe the charter of the company or the laws of the state, must not be unreasonable, and must be within the range of the general powers of the corporation.¹ And the question, whether reasonable or

¹ *Elwood v. Bullock*, 6 Q. B. 383; *Calder Navigation Co. v. Pilling*, 14 M. & W. 76; *Child v. Hudson Bay Co.*, 2 Peere Wms. 207; *Angell & Ames*, c. 10; 2 Kent, Comm. 296; *Davis v. Meeting-house in Lowell*, 8 Met. 321. In a recent case in Kentucky it is said the power of a corporation to make by-laws is limited by the nature of the corporation and the laws of the country. It can make no rule contrary to law, good morals, or public policy. *Sayre v. Louisville Union Benevolent Association*, 1 Duvall, 143.

not, is to be determined by the jury under instructions from the court, being a mixed question of law and fact.² But in a recent case in New Jersey,³ it was decided that the question, whether the regulation of a corporation affecting third persons is reasonable, is a question of fact; but the validity of a by-law of a corporation, which affects only its members, is a question of law to be determined by the court. The general powers of business corporations to enact by-laws was extensively and learnedly discussed in a somewhat recent case which passed through the Queen's Bench, the Exchequer Chamber, and was finally determined in the House of Lords.⁴ The case turned mainly upon the reasonableness of the by-law, which excluded any person who had become bankrupt or notoriously insolvent from becoming one of the governing body of the company. The provision of the by-law was held entirely reasonable; but that having admitted the party to the office, he could not be removed without formal proceeding upon notice and hearing. And where one part of a by-law is reasonable it may stand, although connected with another part which is not reasonable.⁵

§ 479. By-laws in violation of common right are void.⁶ The power to make by-laws is usually given in express terms in the charter. And where such power to make by-laws is given in the charter upon certain subjects to a limited extent, this has been regarded as an implied prohibition beyond the limits expressed, upon the familiar maxim *expressum facit cessare tacitum*.⁷

² Day v. Owen, 5 Mich. 520.

³ Ayres v. Morris & Essex Railw. Co., 5 Dutcher, 393.

⁴ Reg. v. Saddlers' Company, 6 Jur. (N. S.) 1113; s. c., 7 id. 138; s. c., 9 id. 1081; s. c., 4 B. & S. 1059; s. c., 10 Ho. Lds. Cas. 404.

⁵ Reg. v. Lundie, 8 Jur. (N. S.) 640.

⁶ Hayden v. Noyes, 5 Conn. 391; Adley v. The Whitstable Co., 17 Vesey, 315; Clark's case, 5 Coke, 64. When the penalty of a by-law is imprisonment, it is void as against Magna Charta. But such power may be given by statute.

⁷ Child v. Hudson Bay Co., 2 Peere Wms. 207.

§ 480. By-laws, unless by the express provisions of the charter or general statutes of the state, are not, in this country, required to be enacted or promulgated in any particular form, but only to be enacted at some legal meeting of the corporation. But in England it is generally considered requisite that by-laws be made under the common seal of the corporation, and that in regard to railways, by-laws affecting those who are not officers or servants of the company should have the approval of the Board of Trade or Railway Commissioners.⁸

§ 481. By many of the special railway charters in England, and by the Companies' Clauses Consolidation Act of 1845, it is provided that railway companies may make by-laws under their common seal "for the purpose of regulating the conduct of the officers and servants of the company, and for the due management of the affairs of the company in all respects whatever." And they have power to enforce such by-laws, by penalty, and by imprisonment for the collection of such penalty. But a by-law requiring a passenger, not producing or delivering up his ticket, to pay fare from the place of the departure of the train, was held not to be a by-law imposing a penalty, and therefore not justifying the imprisonment of such passenger.⁹

§ 482. The statute requires a copy of such by-laws to be furnished every officer and servant of the company, liable to be affected thereby. The code of by-laws framed by the Board of Trade in England for the regulation of travel by railway, and generally adopted there, is certainly very judicious; and if some similar one could be adopted and

⁸ Walford, 249; Hodges, 552, 553.

⁹ *Chilton v. London & Croydon Railw.*, 16 M. & W. 212; s. c., 5 Railw. C. 4. *Parke, B.*, says: "This is not the case of a penalty, but the mere demand of a fare. Any passenger who does not, at the end of his journey, produce his ticket may have broken his contract with the company, and be liable to pay his full fare from the most remote terminus. But this is not a penalty or forfeiture, under section 163, giving a right to arrest for non-payment of a penalty or forfeiture." See, also, the opinion of *Rolfe, B.*, from which it appears that the by-law was considered valid.

enforced here, it would accomplish very much towards security, sobriety, and comfort, in railway travelling, and tend to exempt the companies from much annoyance and very often from loss.¹⁰

¹⁰ Hodges, 453. "1. No passenger will be allowed to take his seat in or upon any of the company's carriages, or to travel therein upon the said railway, without having first booked his place and paid his fare. Each passenger booking his place will be furnished with a ticket, which he is to show when required by the guard in charge of the train, and to deliver up before leaving the company's premises, upon demand, to the guard or other servant of the company duly authorized to collect tickets. Each passenger not producing or delivering up his ticket will be required to pay the fare from the place whence the train originally started.

"2. Passengers at the road stations will only be booked conditionally, that is to say, in case there should be room in the train for which they are booked; in case there shall not be room for all the passengers booked, those booked for the longest distance shall have the preference; and those booked for the same distance shall have priority according to the order in which they are booked.

"3. Every person attempting to defraud the company, by riding in or upon any of the company's carriages, without having previously paid his fare, or by riding in or upon a carriage of a higher class than that for which he has booked his place, or by continuing his journey in or upon any of the company's carriages beyond the destination for which he has paid his fare, or by attempting in any other manner whatever to evade the payment of his fare, is hereby subjected to a penalty not exceeding forty shillings.

"4. Smoking is strictly prohibited both in and upon the carriages, and in the company's stations. Every person smoking in a carriage is hereby subjected to a penalty not exceeding forty shillings; and every person persisting in smoking in a carriage or station, after being warned to desist, shall, in addition to incurring a penalty not exceeding forty shillings, be immediately, or, if travelling, at the first opportunity, removed from the company's premises, and forfeit his fare.

"5. Any person found in the company's carriages or stations in a state of intoxication, or committing any nuisance, or otherwise willfully interfering with the comfort of other passengers, and every person obstructing any of the company's officers in the discharge of their duty, is hereby subjected to a penalty not exceeding forty shillings, and shall immediately, or, if travelling, at the first opportunity, be removed from the company's premises, and forfeit his fare.

"6. Any passenger cutting the linings, removing or defacing the number-plates, breaking the windows, or otherwise willfully damaging or injuring any of the company's carriages, shall forfeit and pay a sum not exceeding £5 in addition to the amount of damage done."

"*Note.*—Persons willfully obstructing the company's officers, in cases where personal safety is concerned, are liable, under the 3 & 4 Vict. c. 97, section 16, to be apprehended and fined £5, with two months' imprisonment in default of payment."

§ 483. In a recent case in Vermont, it was held, that railway companies have the power to make and enforce all reasonable regulations in regard to the conduct of passengers, and to discriminate between fares paid in the cars and at the stations, and to remove all persons from their cars who persist in disregarding such regulations, in a reasonable manner and proper place, although between stations.

§ 484. But this may be controlled as to existing railways even, by general legislation of the state. And where a statute gave all railways the power to remove those who violated any of the by-laws or regulations of the company from their cars, *at the regular stations*, this was held to carry an implied prohibition from removing such persons at other points.¹¹ And where one refuses to pay fare, and the train is stopped for the purpose of putting him off the train, at a dwelling-house, as by the statute of New York is allowed, the right of the conductor is not affected by a subsequent offer to pay fare.¹² So, too, one may be ejected from the cars by the conductor for disorderly conduct, and in justification, it is competent to prove any improper conduct during the entire passage, and this cannot be controverted by general evidence of the good reputation of the person for sobriety. And one may be expelled, also, for refusing to surrender his ticket to the conductor on request, in conformity with the general regulations of the company.¹³

§ 485. But it has been held, that a general power to make by-laws for the regulation of the use of a canal, will not justify the proprietors in closing the navigation of the

¹¹ *Stilphen v. Smith*, 29 Vt. 160; *Chicago, Burlington, & Quincy Railw. v. Parks*, 18 Ill. 460. See late case in New Hampshire, in which it is held, railways may lawfully discriminate between fare paid in the cars and at the stations. *Hilliard v. Goold*, 34 N. H. 230; *post*, pt. iii. n. 17; ch. xviii.

¹² *People v. Jillson*, 3 Parker, C. R. 234.

¹³ *People v. Caryl*, 3 Parker, C. R. 326.

canal on Sundays,¹⁴ nor in making by-laws subjecting the shares to forfeiture for non-payment of calls, unless that power is expressly given by the charter or by statute.¹⁵

§ 486. And a by-law declaring that the company would not be responsible for a passenger's baggage, unless booked and the carriage paid, is bad, as inconsistent with the general law, allowing railway passengers to carry a certain amount and kind of baggage.¹⁶

§ 487. The members of a joint-stock company are affected by all binding statutes of the corporation from the time of their enactment, without any formal notice of their existence. And all persons legally affected by such statutes, rules, or by-laws of the corporation, must conform to their requirements from the time they become aware of their existence.¹⁷

§ 488. Regulations as to the accommodation of passengers must yield to the right of others to be carried, and the accommodation of passengers during the transit is subject to such general rules and regulations as the carrier may see fit to make, provided they are reasonable. And whether that be so is to be determined by the jury, under suitable instructions from the court.¹⁸ But these rules and regulations must have for their object the accommodation of the passengers generally, and must be of a permanent nature, and not made for a particular emergency or occasion.¹⁸

¹⁴ *Calder Nav. Co. v. Pilling*, 14 M. & W. 76; s. c., 3 Railw. C. 735. But it is questionable whether this case is maintainable, in this country, upon any such grounds.

¹⁵ *Matter of Long Island Railw.*, 19 Wend. 37; s. c., 2 Am. Railw. C. 453.

¹⁶ *Williams v. Great Western Railw.*, 10 Exch. 15; s. c., 28 Eng. L. & Eq. 439. But it seems somewhat questionable, whether the principle of this decision can ultimately be maintained. It seems to be no unreasonable abridgment of the right of a passenger to carry a certain weight and kind of baggage, to require it to be booked and carriage paid.

¹⁷ *Woodfin v. Ins. Co.*, 6 Jones's Law, 558.

¹⁸ *Day v. Owen*, 5 Mich. 520. This we are aware is the practice in America, in almost all modes of passenger transportation, to cram the carriages and boats to

the point of suffocation, almost, if passengers offer. But that is never attempted or allowed in England or upon the Continent. Whenever the seats in a carriage or the accommodations in a boat are all occupied, no more are allowed to enter the carriage or the boat. This sometimes results in putting a first-class passenger into a second-class carriage, and *vice versa*. But no man in Europe would ever be allowed to take passage in a railway carriage, without having a seat. It would be deemed the height of indiscretion, almost bordering on madness, to attempt to transport passengers by railway in a standing position. And even in omnibuses, no one can enter after the seats are filled. And in Paris a prominent sign, *Complet*, is exposed the moment the carriage is full.

And it seems to us that a passenger-carrier who is supplied with sufficient accommodations for all who ordinarily offer, had better be excused from carrying any excess which might occasionally offer, than be compelled to carry them at the expense of the discomfort and suffering of all the other passengers. We think, at least, that if railways took this ground upon the score of safety merely, they would not fail to be sustained by the courts, unless the excited rush of all to go by the first chance is to override all other considerations, either of safety or convenience. And we trust that public opinion here is more reasonable than to make any such demands.

CHAPTER XVII.

BY-LAWS REGULATING THE USE OF STATIONS AND GROUNDS.

§ 489. <i>May exclude persons without business.</i>	<i>means of injunction; equality of charges.</i>
§ 490. <i>May regulate the conduct of others.</i>	§ 495. <i>Through trains will not be required, unless reasonably necessary for public accommodation.</i>
§ 491. <i>Superintendent may expel for violation of rules.</i>	§ 96. <i>Mode of enforcing search-warrants in freight stations.</i>
§ 492. <i>Probable cause will justify.</i>	§ 497. <i>The rights of railway companies to exclude persons, having no business, from their stations.</i>
§ 493. <i>In civil suit must prove violation of rules.</i>	
§ 494. <i>Regulation of stations and traffic by</i>	

§ 489. QUESTIONS have sometimes been made, in regard to the right of railway companies to exclude persons from their grounds, who had no business to transact there, connected with the company, or to establish regulations or by-laws to govern the conduct of such persons as had occasion to come there, and to exclude others. But, upon the whole, there seems little ground to question the right.¹

§ 490. A railway corporation has authority to make and carry into effect reasonable regulations for the conduct of all persons using the railway, or resorting to its depots, without prescribing such regulations by formal by-laws; and the superintendent of a railway station, appointed by the corporation, has the same authority, by delegation.

§ 491. Such superintendent may exclude from the stations and grounds persons who persist in violating the

¹ *Barker v. Midland Railw.*, 18 C. B. 46; s. c., 36 Eng. L. & Eq. 253; *Commonwealth v. Power*, 7 Met. 596; s. c., 1 Am. Railw. C. 389; *Hall v. Power*, 12 Met. 482.

reasonable regulations prescribed for their conduct, and thereby annoy passengers, or interrupt the officers and servants of the company in the discharge of their duty. Thus, where the entrance of innkeepers and their servants into a railway station to solicit passengers to go to their houses, produces such effect, they may be excluded from coming within the station; and if, after notice of a regulation to that effect, they attempt to violate it, and after notice to leave, refuse to do so, they may be forcibly expelled by the servants of the company, using no unnecessary force.

§ 492. And where an innkeeper had been accustomed to annoy passengers in this manner, and had been informed by the superintendent of the station that he must do so no more, but still continued the practice, and afterwards obtains a ticket for a passage in the cars, with the *bonâ fide* intention of entering the cars as a passenger, and goes into the station on his way to the cars, and the superintendent, believing he had entered for his usual purpose, orders him to go out, and he does not exhibit his ticket, nor give notice of his real intention, but pushes forward toward the cars, and the superintendent and his assistants remove him from the station, using no unnecessary force, the removal is justifiable,² and not an indictable offense.²

§ 493. But the superintendent cannot remove a person from the station and grounds of the company, merely because such person, in the judgment of the superintendent, and without proof of the fact, violated the regulations of the company, or conducted himself offensively toward the superintendent.³ And it was said if such person is

² Commonwealth v. Power, 7 Met. 596; Markham v. Brown, 8 N. Hamp. 523.

³ Hall v. Power, 12 Met. 482; s. c., 1 Am. Railw. C. 410. There is an apparent discrepancy in the manner of stating the point of the decision of this case, and that of The Commonwealth v. Power, 7 Met. 596, in regard to defendant being justified, if he acted in good faith upon probable cause, which does not seem to be warranted, by any recognized distinction, between a civil suit for damages, and a public prosecution for assault and battery, but the court evidently intend no distinction in the cases. The law is well stated by Shaw, Ch. J., in the

removed for an alleged violation of the regulations of the company, and it finally is shown that he did not in fact

former case, 7 Met. 602: " We are therefore of opinion, that upon the evidence detailed in the judge's report, the jury should be instructed in a manner somewhat as follows: That if Power had been placed in charge of the depot by the corporation, as superintendent, he had all the authority of the corporation, both as owners and occupiers of real estate, and also as carriers of passengers, incident to the duty of control and management: That this power and authority of the corporation extended to the reasonable regulation of the conduct of all persons using the railway, or having occasion to resort to the depots, for any purpose: That this power was properly to be executed by a superintendent, adapting his rules and regulations to the circumstances of the particular depot under his charge; and that it was not necessary that such regulations should be prescribed by by-laws of the corporation: That the opening of depots and platforms for the sale of tickets, for the assembling of persons going to take passage, or landing from the cars, amounts in law to a license to all persons, *primâ facie*, to enter the depot, and that such entry is not a trespass; but that it is a license conditional, subject to reasonable and useful regulations; and, on non-compliance with such regulations, the license is revocable, and may be revoked either as to an individual, or as to a class of individuals, by actual or constructive notice to that effect: That if the platform, as part of the depot, is appropriated to and connected with the entrance of passengers into the cars, and the exit of passengers from the cars, and for the accommodation of their baggage, and if the soliciting of passengers to take lodgings in particular public-houses, by the keepers of them or their servants, is a purpose not directly connected with the carriage of passengers by the railroad, on their entrance into or exit from cars; that if, when urged with earnestness and importunity, it is an annoyance of passengers, and interruption to their proper business of taking or leaving their seats in the cars, and procuring or directing the disposition of their baggage; or if the presence of such persons, for such a purpose, is a hindrance and interruption to the officers and servants of the corporation, in the performance of their respective and proper duties to the corporation, as passenger-carriers; then the prohibition of such persons from entering upon the platform is a reasonable and proper regulation, and a person who, after actual or constructive notice of such regulation, violates or attempts to violate it, thereby loses his license to enter the depot; that such license as to him may be revoked; and if, upon notice to quit the depot, he refuses so to do, he may be removed therefrom by the superintendent and the persons employed by him; and if they use no more force than is necessary for that purpose, such use of force is not an assault and battery, but is justifiable: That as to the circumstances of the present case, if the superintendent had issued a circular, giving notice to all innkeepers and landlords that he had prohibited them from entering the depot to solicit persons to go to their respective houses as guests, and if this notice came to Hall, and he afterwards, and after special notice to him personally, had attempted to violate this prohibition, and solicit passengers; and if, upon the particular occasion, he gave no notice of coming for any other purpose; and if the defendant Power met him on his way to the platform, told him he must not go there, laid his hands on him, and ordered him to leave the depot,

violate any of such regulations, he may recover damages of the superintendent of the station by whose order he was removed, notwithstanding such superintendent acted in good faith.³ And in such case, it is not competent to show that the plaintiff had been guilty of former violations of other regulations of the company.³

§ 494. Under the English statute of 17 & 18 Vict., requiring among other things that the superior courts of Westminster Hall shall enforce the duty of railway companies in regard to their traffic in goods and passenger transportation, it was held a proper ground for granting a rule to show cause why an injunction should not issue, that at one of the stations of the company, where an important junction with other roads occurred, no covered place was provided for the accommodation of the passengers.⁴ But the English Railway Traffic Act does not justify the courts in requiring the companies to make the same charges, or to afford the same facilities in regard to return tickets of a particular class, on one of their branches, which they do upon others.⁴ To constitute inequality of charges, it must be for passing over the same line, or the same part of the line.⁴

§ 495. To justify the courts in interfering to require the

without any inquiry as to the purposes of Hall, and Hall made no reply, but pressed forward and attempted to reach the platform, in spite of the efforts of Power; this was strong *primâ facie* evidence that he was going there with intent to solicit passengers, in violation of the notice and revocation of license; and that if he gave no notice of his intention to enter the car as a passenger, and of his right to do so; and if Power believed that his intention was to violate a subsisting reasonable regulation, then he and his assistants were justified in forcibly removing him from the depot: That if Hall gave no notice of his having a ticket of his intention and purpose to enter the cars as a passenger, and of his right to do so, and that Power had no notice of it, then Hall could not justify his conduct and make Power a wrongdoer, by proving the possession of such a ticket, or of his intent to go in the cars to Richmond, as a passenger; and that he was to be considered as standing on the same footing as if he had not possessed such ticket."

⁴ Caterham Railw. Co. v. London & Brighton Railw. Co., 40 Eng. L. & Eq. 259; s. c., 1 C. B. (N. S.) 410.

companies constituting a continuous line to run through trains, it must be shown that public convenience requires it, and that it can reasonably be done.⁵ And they will not interfere in such cases where there is another route where through tickets may be obtained, although somewhat longer, no additional cost or serious loss of time being thereby incurred, and there being no general complaint of public inconvenience on that account.⁵

§ 496. A railway freight station or warehouse, kept by a railway company for the storage of goods transported by them, is not exempt from the process of search-warrant under the statute against keeping and sale of spirituous liquors; nor is it necessary that such warrant should be executed during the usual business hours, or that the officer should consult the person who has charge of the station.⁶

§ 497. The Supreme Court of Vermont decided, that *primâ facie*, railway stations were open to all persons, but the company may revoke such implied license to all, and exclude all except such as have legitimate business there, growing out of the operation of the road, and with the officers or employees of the company. They may direct all others to leave the stations, and on refusal may remove them. It is the duty of such persons as desire to remain in such stations, for the purpose of taking the cars, or for any other lawful purpose, to make known the same to the officers and employees of the company, on request. And if such is the regulation of the company, one purposing to become a passenger may be required to purchase his ticket, in order to remain in the station. This right of entering the stations to take the cars can only be exercised in conformity with the regulations of the company, and within a reasonable time only before the departure of the trains, which will depend upon the circumstances of each

⁵ Barret v. Great Northern Railw., 1 C. B. (N. S.) 423.

⁶ Androscoggin Railw. Co. v. Richards, 41 Me. 233.

case. It is not requisite the person should enter the station with the purpose of taking passage, it is enough that he entertains the purpose, at the time he refuses to leave, and conducts in other respects in conformity with the regulations of the company.

CHAPTER XVIII.

BY-LAWS AS TO PASSENGERS.

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| <p>§ 498. <i>By-laws as statutes.</i></p> <p>§ 499. <i>As mere rules, or regulations.</i></p> <p>§ 500. <i>Requiring larger fares, for shorter distances.</i></p> <p>§ 501. <i>Requiring passengers to go through in same train.</i></p> <p>§ 502. <i>Arrest of passenger, by company's servants.</i></p> <p>§ 504. <i>Company liable for act of servant.</i></p> <p>§ 505. <i>By-law must be published.</i></p> <p>§ 506. <i>Excluding merchandise from passenger trains.</i></p> | <p>§ 507. <i>Discrimination between fares paid in cars and at stations.</i></p> <p>§ 508. <i>Liability for excess of force.</i></p> <p>§ 509. <i>Officer de facto may enforce rules of company.</i></p> <p>§ 510. <i>Company cannot enforce rule against passenger, when in fault themselves. The consent of the corporation to tariff of fares, how presumed.</i></p> <p>§ 511. <i>The right of the company to require colored passengers to occupy particular seats.</i></p> |
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§ 498. A DISTINCTION is sometimes made between by-laws, and orders or regulations, the former being supposed, in strictness of language, to have reference exclusively to the government of their own members, and of their corporate officers.¹ And it is true that such other ordinances, as any owner of the buildings and grounds, about a railway station, employed in carrying passengers, might find it convenient to establish, are certainly not what is ordinarily understood by the by-laws, or statutes, of the corporation.

§ 499. But in the English cases they are both called by-laws.² Thus, a by-law, that each passenger, on booking

¹ *Shaw*, Ch. J., in *Commonwealth v. Power*, 7 Met. 601.

² *Chilton v. London & Croydon Railw.*, 16 M. & W. 212; s. c., 5 Railw. C. 4. It would seem from the opinion of *Parke*, B., that the by-law was regarded as valid, but as imperfect, in not subjecting the passenger to a penalty in terms. The other judges doubted whether the act was intended to give the company power to imprison the plaintiff, or any one, except for some offense against the act. But all seemed to concur in the opinion that the passenger was bound to comply with the regulation, or submit to the alternative. *State v. Overton*, 4 Zab. 435.

his place, should be furnished with a ticket, to be delivered up before leaving the company's premises, and that each passenger, not producing or delivering up his ticket, should be required to pay fare from the place whence the train originally started, was held not to be a by-law imposing a penalty.² And that therefore the non-production of the ticket, with which a passenger had been furnished, and his refusal to pay fare from the place whence the train started, did not justify his arrest, but only rendered him liable to pay fare from the place whence the train started.

§ 500. But in a late English case,³ where the company had made a legal by-law, that any passenger, who should enter a carriage of the company, without first having paid his fare, should be subjected to a penalty not exceeding 40s., a passenger, desiring to go to Diss station, where the fare was 7s., procured a ticket for Norwich, a more distant station on the line, but where the fare was but 5s., in consequence of competition, and entered the carriage accordingly, and at Diss offered to surrender his ticket, but refused to pay the difference in fare, he was prosecuted for the penalty, and a majority of the Court of Queen's Bench held he was not liable, on the ground that he had paid his fare before entering the carriage. Lord *Campbell* said, "I cautiously abstain from expressing any opinion, as to the power of the company to make special regulations, or by-laws, so as to enforce larger fares, for shorter distances." "Had not Frere, within the meaning of the by-law, paid his fare, before he entered the carriage? I think he had. He had paid the full fare from Colchester to Norwich, all that was required of him; and he cannot be said to be a person who had entered the company's carriage without payment of fare."⁴

§ 501. It has been held that a regulation requiring passengers to go through, in the same train, and that if one

² Reg. v. Frere, 4 El. & Bl. 598; s. c., 29 Eng. L. & Eq. 143.

⁴ But the argument of Lord *Campbell* on this point does not seem altogether

do not, requiring fare for the remainder of the route, is valid.⁵ And where the ticket was marked "good only

satisfactory. Whether the passenger had paid his fare depended upon the validity of the by-law, and could not be fairly determined upon any other basis, it would seem. Frere had paid fare to Norwich, but had not paid fare to Diss, unless the by-law was void; so that the validity of the by-law did seem to be necessarily involved in the decision. And the decision of the court, although not professing to do so, did virtually disregard it. For if the by-law was valid, Frere had no more paid his fare than if he had taken a ticket to a station short of his destination. And if the by-law meant anything sensible, it could only mean, having paid fare to his destination. Any other construction looks like an evasion.

⁵ *Cheney v. Boston & Maine Railw.*, 11 Met. 121; s. c., 1 Am. Railw. C. 601. In this case the passenger, when he bought his ticket, did not know of the regulation, but was informed of it in the cars, and his money offered to be refunded, deducting what he had travelled; but he refused to make the arrangement, and demanded his ticket, in exchange for the check which had been given him, marked "good for this trip only." He stopped by the way, and went on the same day in the next train; and when he presented his check, it was refused and fare demanded, which he was obliged to pay. The court held the passenger could not recover the money of the company, and that it made no difference whether the plaintiff were aware of the regulation or not, at the time he purchased his ticket. He was bound to inform himself, or accept of the ticket, for what it entitled him to demand, by the rules of the company.

This subject is a good deal discussed in a case in New Jersey, and a similar result arrived at. It is there said that the company may discriminate between way and through fare, unless prohibited by law. *State v. Overton*, 4 Zab. 434. In *Pier v. Finel*, 24 Barb. 514, where a person was put off the cars of a railway company for refusal to pay fare, having, and offering to the conductor, a ticket of the company, dated a few days before, and marked "good for this trip only," but unmutilated, it being the practice of the conductors upon that road, where a ticket had been used, to give it a mark; it was held that the ticket was *prima facie* evidence that the holder had paid the regular fare for it, and of his right to be transported, at some time, between the places specified, on some passenger train; and if unmutilated, the presumption was, that it had never been used, and that it imposed upon the company the duty to so transport the holder.

It was also held that the indorsement "good for this trip only," had reference to no particular trip, or any particular time, but only to some one continuous trip. That the passenger might demand a passage, as well on a subsequent day as the one upon which the ticket bore date, and was issued.

This decision seems to us not precisely to meet the whole question involved in the case, that is, whether such a regulation, as was claimed to be evidenced by the ticket and the indorsement, was a valid and binding regulation. There can be no doubt such a regulation exists, upon many of the roads, in this country, and that such a ticket is understood, by the community generally, as entitling the holder only to a passage on that day, at most, if not in the very next train.

We very readily perceive that the form of the ticket is susceptible of the con-

two days after date," it was held to be evidence of a contract to that effect between the railway and the purchaser,

struction put upon it by the court. But as we are satisfied that is not the understanding of those who issue such tickets, or of those who buy them, as a general thing, we should have been gratified to see the main question grappled with.

We do not intend to intimate any question of the general soundness of the views expressed in this case, upon what we regard as the true construction of the ticket. We are inclined to think they are sound. For it seems to us to be contrary to the first principles of justice and equity, that if the passenger is, for sufficient cause, delayed, or hindered from going, according to his expectation, at the time he pays his fare, that he should thereby lose all benefit of the payment when he does desire to go. The company may not be bound to refund the money, but they certainly are bound, upon general principles, to allow the holder of the ticket the benefit of his unused portion of it, deducting, of course, any loss, or inconvenience to them, by reason of the contract not being carried into effect, according to its terms. And any regulation of the company, which should deprive the passenger of this benefit, would operate a forfeiture, which no court of justice will favor, where the passenger is not in fault. It seems, in principle, to be controlled by the rule of law applied to work done upon the company's road, but not according to the contract, and which, nevertheless, the company are benefited by, to a certain extent. In such cases the company must pay for the work, at its value to them, that is, deducting all losses, in consequence of it not being done as stipulated. 1 Redf. Railw. 113, pl. 4.

So, also, if the passenger refuse to surrender his ticket in exchange for the conductor's check, according to the regulations of the company, and at any point of the route leave the cars, without surrendering his ticket, he is liable to pay fare for the distance he rode, or upon his refusal to surrender his ticket, or to pay fare, the conductor is justified in expelling him from the cars. *Northern Railroad v. Page*, 22 Barb. 130. But passengers are not obliged to surrender their tickets without having a check in exchange by which they may be able to show that they have paid fare. *State v. Thompson*, 20 N. H. 250. In *Hibbard v. New York & Erie Railw.*, 15 N. Y. 455, it was held, that a regulation, made by a railway company, requiring passengers to exhibit their tickets whenever requested by the conductor, and directing those who refused to do so to be expelled from the cars, was reasonable and valid, and that passengers were bound to conform to it, and forfeited all right to be carried further by refusal to do so. And it was further held, that the binding force of such a regulation was matter of law to be decided by the court, and that under such a regulation, where a passenger refused, on request, to exhibit his ticket a second time, the train having in the mean time passed a station, it was error in the court to charge the jury, that the passenger was bound to exhibit his ticket, when reasonably requested, and that if the conductor knew he had paid his fare he had no right to expel him from the cars.

It is intimated in this case, that one who has thus forfeited his right, cannot regain it by exhibiting his ticket after the train is stopped for the purpose of putting him off. And also, that the company would not be liable if the conductor put a

and to be of no force after the expiration of the term.⁶ And where the regulations of the company allow the conductors, by making a memorandum on a ticket, to permit the passenger to stay over and pass upon another train, and one stayed over without procuring such memorandum, it was held that another conductor, to whom he presented his ticket in attempting to pass at a subsequent time, was justified in demanding fare, and putting the passenger off the train upon his refusal to pay.⁷

§ 502. In one case,⁸ where the plaintiff, upon the information of the station-clerk that he might return at a given hour upon an excursion ticket, purchased such ticket and took the train named by such clerk to return, but the train did not pass through; and at the place where it stopped the station-clerk demanded 2s. 6d. more, saying he

wrong construction upon the regulation, and thus wrongfully expelled a passenger, or if he were guilty of an excess of force. But see *ante*, pt. iii. ch. xii.

And where a person purchases a railway ticket and starts upon the road, and afterwards gives up his ticket to the conductor, he cannot, at an intermediate station, by virtue of the subsisting contract, leave his seat in that train and afterwards claim a seat in another train. *Cleveland, &c., Railw. v. Bartram*, 11 Ohio, (N. S.) 457.

⁶ *Boston & Lowell Railw. Co. v. Proctor*, 1 Allen, 267; *Shedd v. Troy & Boston Railw.*, 40 Vt. 88. And the same doctrine is maintained in *Johnson v. Concord Railw.*, 46 N. H. 213. And it was here held that ignorance of the by-law or regulation of the company will make no difference. Passengers must inquire if they desire to learn the regulations of the company. And the conductors' having waived them is no evidence of their repeal, unless such waiver was known to the governing officers of the company.

⁷ *Beebe v. Ayres*, 28 Barb. 275.

⁸ *Roe v. Birkenhead, Lancashire, and Cheshire Junction Railw.*, 7 Exch. 36; s. c., 6 Railw. C. 795. And it has been held that a steamboat proprietor might exclude one from his boat, while employed in carrying passengers, if such person was the agent of a rival line of stages to that which, by contract with the proprietor, carried in connection with his boats, the plaintiff's object being, at the time, to solicit passengers to go by the rival line of stages; and the jury having found that the contract was *bonâ fide* and reasonable, and not entered into for the purpose of an oppressive monopoly, and that the regulation excluding plaintiff was necessary in order to carry the contract into effect. *Jencks v. Coleman*, 2 Sumner, 221. But a contract not to carry passengers coming by a particular line will not excuse the carrier from carrying such passenger. *Bennet v. Dutton*, 10 N. H. 481.

should not have taken that train, payment being refused, the superintendent took the plaintiff into custody. The plaintiff's attorney having written the secretary of the company, asking compensation, he requested to be furnished with the date of the transaction, and promised to make inquiries. He also stated verbally that it was an awkward business, and the blame would fall upon the station-clerk who gave the plaintiff the false information, and offered to return the 2s. 6d. It was held that, as there was no evidence of the authority of the defendants to make the arrest, and none of their having expressly or impliedly authorized or ratified it, it must be regarded as the mere tortious act of the servant, for which he alone was responsible.

§ 503. But in a somewhat similar case,⁹ in the Exchequer Chamber, where the plaintiff below had been taken into custody by a railway inspector of the defendants, charged with having no ticket, refusing to pay fare, intoxication, and assaulting the inspector, at the hearing before the magistrate, the solicitor of the company attended to conduct the proceedings; and it was held that such attendance was no ratification by the company, it not appearing that the facts were known to the company. These cases afford more latitude for corporations to escape from liability for the acts of their agents and servants, while employed in the prosecution of their business, than is common in this country.¹⁰

§ 504. But there are many cases in this country where it has been held that trespass will not lie against a corporation for the act of their agents;¹¹ but this is not the

⁹ *Eastern Counties Railway v. Broom*, 6 Exch. 314; 2 Eng. L. & Eq. 406; s. c., 6 Railw. G. 743.

¹⁰ 2 Redf. Railw. 225, and notes. See, also, *ante*, pt. ii. ch. xvii., pt. iii. ch. xii. And in *Coppin v. Braithwaite*, 8 Jurist, 875, it is said to have been ruled by Rolfe, B., at *Nisi Prius*, that a carrier having received a pickpocket as a passenger on board his vessel, and taken his fare, he cannot put him on shore at any intermediate place, so long as he is guilty of no impropriety.

¹¹ *Philadelphia G. & N. Railw. Co. v. Wilt*, 4 Wharton, 143; s. c., 2 Am.

prevailing rule here, where the servant acts within the apparent scope of his authority, and where his acts would bind the principal, being a natural person.

§ 505. An English railway company¹² having power by statute to make by-laws which were to be painted upon a board and hung up at the stations, and to be binding upon all parties, made, among others, a by-law that "first-class passengers shall be allowed one hundred and twelve pounds, and second-class passengers fifty-six pounds luggage each, and that the company will not be responsible for the care of the same unless booked and paid for accordingly." It did not appear that the plaintiff knew of the by-law, or that it had been posted up as required. The plaintiff became a passenger, and gave his luggage to the servants of the company, and it had been stolen. It was held that the company were liable, unless they showed the by-law hung up at the stations, as required by the statute, or else brought home to the knowledge of the plaintiff.

§ 506. A by-law excluding merchandise from the passenger-trains, and confining its transportation to the freight-trains, was held reasonable. The company are not bound to carry a passenger daily upon his paying fare when his trunk, or trunks, contain merchandise, money, and other valuable matter known as "express matter."¹³

§ 507. In a very recent case¹⁴ in Connecticut, it was

Railw. C. 254; *Orr v. Bank of United States*, 1 Ohio, 36; *Foote v. City of Cincinnati*, 9 Ohio, 31. Per *Comstock and Brown, JJ.*, in *Hibbard v. N. Y. & Erie Railw. Co.*, 15 N. Y. 455.

¹² *Great Western Railw. v. Goodman*, 12 C. B. 313; s. c., 11 Eng. L. & Eq. 546.

¹³ *Merrihew v. Milwaukie & Mississippi Railw.*, 5 Law Reg. 364.

¹⁴ *Crocker v. New London, Willimantic, & Palmer Railw.*, 24 Conn. 249. The court were so nearly equally divided in the decision of this case, that it cannot be regarded as much authority, in itself. The leading propositions in the text were maintained, by the Chief Justice and one other judge, and dissented from by two other judges.

The only point of doubt seems to be the duty of the company, in making such discrimination, to give reasonable opportunity to passengers to obtain tickets, at the lowest rate of fare, which seems just and reasonable, and in accordance, we believe, with the generally received opinion upon the subject, and the one we

held, by a divided court, that where a railway company established and gave notice of a discrimination of five cents between fares paid in the cars and at the stations, the regulation was valid, and that where a passenger refused to pay the additional five cents in the cars, the conductor might lawfully put him out of the cars, using no unnecessary force. Upon the trial of an action for such expulsion, it was held that the plaintiff was not entitled to recover upon proof, that he went to the ticket-office of the company a reasonable time before the train left, to procure a ticket; that the office was closed, and so remained till the train departed, and that he so informed the conductor, before his expulsion from the cars. The following propositions are maintained in the opinion of the court: 1. That the defendants, as common carriers, were under no legal obligation to furnish tickets, or to carry passengers for less than the sum demanded, if the fare was paid in the cars. 2. That the plaintiff's claim rested solely upon the assumption, that the defendants had undertaken to carry for the less sum, on certain conditions, which they had themselves defeated. 3. That the regulation did not constitute a contract, but a mere proposal, which they might suspend, or withdraw at any time. 4. That such proposal was withdrawn by closing the defendants' office, and the retirement of their agent therefrom. 5. The proposition being withdrawn, the parties were in the same condition as before it was made; the defendants continuing common carriers were bound to carry the plaintiff for the usual

should have been inclined to adopt. In *Hilliard v. Goold*, 34 N. H. 230, it was held, that a uniform discrimination between fares paid in the cars, and at the stations, not exceeding five cents, was reasonable and legal, and a passenger who had not procured a ticket, and refused to pay the additional five cents demanded of him, for fare paid in the cars, was liable to be expelled. *Chicago, Burlington, & Quincy Railw. v. Parks*, 18 Illinois, 460. And it is here held that where the passenger only pays from station to station, the additional five cents may be required at each payment. The general proposition of the reasonableness of a discrimination between fares paid in the cars and at the stations is maintained in *State v. Goold*, 53 Me. 279. And the passenger is bound by such by-law, whether he knew of it or not. ib.

fare, paid in the cars, and not otherwise. 6. That the plaintiff, refusing to pay such fare, was properly removed from the cars. It was further held by all the judges, that if the plaintiff was wrongfully removed from the cars, he might lawfully reënter them, and if in attempting to do so he received the injury complained of, he was entitled to recover, unless he was himself guilty of some want of care, which produced, or essentially contributed to produce, the injury. But if the expulsion was lawful, or if the plaintiff was guilty of want of care, as stated, he could not recover. The majority of the court also held, that if any of the defendants' employees, whom the conductor called to his aid, in putting and keeping the plaintiff off the cars, intentionally kicked the plaintiff in his face, without the knowledge or direction of the conductor, the defendants are not liable for the act, in trespass. But the more reasonable view in regard to the mode of enforcing a discrimination between fares paid in the cars and at the stations is, that such a regulation, however proper in itself, cannot legally be enforced by the company unless they have afforded every proper and reasonable facility to the passenger for procuring his ticket at the station.¹⁵

¹⁵ *St. Louis & C. Railw. v. Dalby*, 19 Ill. 353; *Chicago, Burlington, & Quincy Railw. v. Parks*, 18 Ill. 460. And in a later case — *St. Louis, Alton, & Terre Haute Railw. v. South*, 43 Ill. — it was decided, that the foregoing cases are not to be construed, as requiring railway companies to keep open their ticket offices, for the sale of tickets to passengers, beyond the time fixed by their established timetables for the departure of a train, but such companies are required to keep open their offices for the sale of such tickets, as passengers are required by them to procure, for a reasonable period before the time so fixed for the departure of such train, and not up to the time of its *actual* departure. They are required to furnish a convenient and accessible place for the sale of passenger tickets, and afford the public a reasonable opportunity to purchase them, and parties who do not avail themselves of the opportunity must submit to pay the extra fare required by the general regulations of the company, or on refusal, to be ejected from the cars. It was also held, in this case, that the right of railway companies to discriminate between fares paid in the cars and at the stations was dependent upon the fact that a reasonable opportunity had been afforded for procuring tickets at the lower rate. These doctrines seem to us reasonable and just, and we should be surprised to have them fail of general acceptance by the courts.

§ 508. There is no question upon general principles, in an action or indictment, against the conductor of a railway train, for unlawfully expelling a passenger, where the evidence shows a right to make the expulsion, the conductor may nevertheless become liable for the manner of doing it. This is a question to be determined by the jury, and cannot ordinarily be decided by the court, as matter of law. If there be an excess of force, or it be applied in an unreasonable and improper manner, the conductor is liable for such excess, to respond in damages, to the party, and also to public prosecution, for a breach of the peace.¹⁶

§ 509. The authority of the conductor of a railway train, or of any other servant of the company, to enforce their regulations, does not depend upon the formal mode of his appointment, but upon the fact of his being employed at the time in the particular office.¹⁶

§ 510. In a late English case,¹⁷ where the railway company had established a by-law requiring all passengers to purchase tickets before entering the cars, and to show the tickets when required so to do, and to deliver them up, on request, before leaving the company's premises, and the plaintiff took tickets for himself and three boys, and three horses, by a certain train, which was afterwards divided by the company's servants into two parts, one being composed of passenger carriages and the other of horse-boxes; and the plaintiff retained all the tickets and travelled by the first-mentioned portion of the train, so that the boys, who were left to go in the other portion of the train, were unable to produce their tickets when requested, and were accordingly excluded by the company's servants from entering the horse-boxes; it was held a breach of contract by the

¹⁶ *Hilliard v. Goold*, 34 N. H. 230; *State v. Ross*, 2 Dutcher, 224. In this last case the principal evidence of excess was, that the conductor kicked a passenger who, in a state of intoxication, persisted in attempting to get upon the train, and the court held the conviction proper.

¹⁷ *Jennings v. Great Northern Railw. Co.*, Law Rep. 1 Q. B. 7; s. c., 12 Jur. (N. S.) 331.

company, for which they were responsible. A tariff of fares or freight must have the sanction of the corporation to become of binding obligation. But when they are established and posted up by the president, and acted upon in transacting business of the company without objection, the consent of the corporation will be presumed.¹⁶

§ 511. There has been considerable controversy in the country, how far railway companies have the legal right to require colored passengers to sit in a particular car, or portion of the car. That right was maintained by the Supreme Court of Pennsylvania,¹⁸ but it has been denied in other courts. The recent amendments of the United States Constitution have been supposed by some to settle this question. There seems to be no sufficient reason why any such discrimination should now be made, and when the animosities growing out of the former existence of slavery in the country shall have effectually subsided, it is to be hoped that any such questions will cease to be raised. Persons of the highest culture and refinement, as a general thing, feel less sensitive on this subject than those of more questionable position, and their example will constantly tend to lead others in the right path. So far as questions of this kind have been attempted to be raised for mere purposes of political advantage, on the one side or the other, nothing could be more unbecoming, or more likely in the end to recoil upon the inventors.

¹⁸ *West Chester Railw. v. Miles*, 55 Penn. St. 209.

CHAPTER XIX.

DUTY OF CONNECTING COMPANIES TO PASSENGERS AND OTHERS.

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| <p>§ 512. <i>Company bound to keep road safe. Act of other companies no excuse.</i></p> <p>§ 513. <i>Some cases hold that passengers can only sue the company carrying them. Quere?</i></p> <p>§ 514. <i>Passenger-carriers bound to make landing-places safe.</i></p> <p>§ 515. <i>But those who ride upon freight-trains, by favor, can only require such security as is usual upon such trains.</i></p> <p>§ 516. <i>Owners of all property bound to keep</i></p> | <p><i>it in state not to expose others to injury.</i></p> <p>§ 517. <i>This rule extends to railways, where persons are rightfully upon them.</i></p> <p>n. 3. <i>Cases, as to the necessity of privity of contract existing, reviewed.</i></p> <p>§ 518. <i>One who keeps open public works is bound to keep them safe for use.</i></p> <p>§ 519. <i>Corporations presumptively responsible to the same extent as natural persons in the same situation.</i></p> |
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§ 512. A PUBLIC company, like a canal or railway, who are allowed to take tolls, owe a duty to the public to remove all obstructions in the canal or upon the railway, although not caused by themselves or their servants, but by those who are lawfully in the use of the canal or railway, or by mere strangers.¹ Nor can a railway company excuse themselves from liability for injury to passengers carried over any part of their road, by showing that the particular neglect was that of a servant employed and paid by a connecting road as a switchman at the junction of two railways.²

¹ *Parnaby v. Lancaster Canal Co.*, 11 Ad. & Ell. 223; and *Lancaster Canal Co. v. Parnaby*, id. 230. See *Redf. Railw.*, § 145, pl. 7, 8, and note.

² *McElroy v. Nashua & Lowell Railw.*, 4 Cush. 400. *Shaw*, Ch. J., here says: "The switch in question, in the careless and negligent management of which the damage occurred, was a part of defendants' road, over which they must necessarily carry all their passengers, and although provided for, and attended by a servant of the Concord company, at their expense, yet it was still a part of the Nashua & Lowell Railroad, and it was within the scope of their duty to see that the switch was rightly constructed, and attended, and managed, before they were justified in carrying passengers over it."

§ 513. But it was held that a passenger, who suffered an injury in attempting to get upon the cars of one company, while using the road of another company, by contract with such company, through a defect in the construction of the road of the latter company, could not maintain an action against them, there being no privity of contract between the plaintiff and such company; the remedy being in such case against the company who were carrying the plaintiff as a passenger.³

³ *Murch v. Concord Railw.*, 9 Foster, 9; *Winterbottom v. Wright*, 10 M. & W. 109. But a railway company owe a public duty, independent of all privity of contract, to keep their public works in such a state of repair, and so watched and tended as to insure the safety of all who are lawfully upon them, either by their direct permission or mediately through contract with other parties. *Sawyer v. Rutland & Burlington Railw.*, 27 Vt. 377. This is here thus stated by *Isham, J.*: "That duty is imposed upon the defendants at common law, and it arises not from any contract of the parties, but from the acceptance of their charter, and from the character of the services they have assumed to perform. The obligation to perform that duty is coextensive with the lawful use of the road, and is required as a matter of public security and safety." The same principle is maintained in *Smith v. New York & Harlem Railw. Co.*, 19 N. Y. 127, where it was decided that a switch-tender, employed by a railway company on a portion of its road upon which it permits another company to run trains, is not a servant of the latter; and an engineer of the latter, injured by the negligence of such switch-tender, may maintain an action against the company employing him. But where animals were killed by the train of one company, while rightfully upon the track of another company, it was held that the company owning the road was responsible for the damage. *Ind. & Madison Railw. v. Solomon*, 23 Ind. 534. So an apothecary, who sold a deadly poison labeled as a harmless medicine, was held directly liable to all persons injured thereby, in consequence of the false label, without fault on their part. The liability of the apothecary arises, not out of any contract or privity between him and the person injured, but out of the duty which the law imposes upon all, to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug, with such label, may have passed through many intermediate sales before it reaches the hands of the person injured, upon the same principle that one who suffers a dangerous animal to go at large, is responsible for the consequences. *Thomas v. Winchester*, 2 Seld. 397.

In *Toomey v. London, Brighton, & South Coast Railw.*, 3 C. B. (N. S.) 146, the plaintiff mistook a door at a railway station, and passing through it, instead of another, fell down a flight of steps and was hurt. There was a light over the door which he intended to pass through, and a printed notice showing the purpose of it. There was also an inscription over the other, but no light. The defendant could not read. There was no evidence that the steps were more than ordinarily

§ 514. And while the cases recognize the duty in such companies as carry passengers, either upon their own road or that of other companies, by permission or lease, to make the approaches to such road safe, at all points where freight or passengers are usually received, this duty does not exist in regard to a passenger who, out of special favor, is allowed to get upon the train at an unusual place for receiving passengers.³

§ 515. And one who, by favor, is allowed to travel upon a freight-car, contrary to the usual custom of the company, is bound to be satisfied with such facilities and accommodations as usually exist upon freight-trains, as railway companies are not to be regarded as common carriers of passengers upon their freight-trains, unless they make it an habitual business.³

§ 516. It has been held that natural persons, who assume no public duties, are liable, if they suffer their

dangerous. Held, that the company were not liable. But a railway company is bound to fence a station so that the public may not be misled, by seeing a place unfenced, into injuring themselves by passing that way, being the shortest to the station. Where a passenger, in waiting for a train, had gone to a public-house for refreshments, the porter showing him the way with his lantern, and hearing the bell ring started out for the station, and mistaking the light of the engine for that of the station crossed an open space direct, and was injured by falling into a hole three feet deep, it was held the company were liable. *Burgess v. Great Western Railw.*, 6 C. B. (N. S.) 923.

Nor is a railway company liable for an injury through the defect of a crane which they had furnished to enable the consignee of heavy goods to unlade them from the cars, although such crane was known to them to be inadequate for the use for which it was furnished, the party injured having been employed to assist the consignee, and thereby lost his life. The case is put upon the ground of want of privity, it being admitted that the company would, in such case, have been liable to the party to whom they furnished the crane, if he or his ordinary servants had sustained injury in its prudent and lawful use. But the party here was called in for the occasion. *Blakemore v. The Bristol & Exeter Railw.*, 8 El. & Bl. 1035; s. c., 31 Law Times, 12. It seems to us the principle of want of privity is here misapplied. This is a clear case of tort and not of contract, and the party injured, although called in for the occasion, was *pro hac vice* a servant of the borrower, and it was the same as if the borrower himself had been injured. The furnishing the instrument had express and direct reference to its use by the consignee and his servants, extraordinary as well as ordinary.

property to remain in a dangerous condition; as that the occupier of land is bound to fence off a hole or area upon it which adjoins or is so close to a highway that it may be dangerous to passers-by, if left unguarded.⁴

§ 517. The same rule has often been extended to turnpike roads⁵ and to plank roads, where the statute made no provision for the liability of the company.⁶ And the same rule has been extended generally to railway companies in this country, without question, so far as persons are rightfully in the use of the same.⁷ It was held that the owner of a car which was in the use of another party, upon a railway, by contract between him and the company, and suffered an injury by reason of the bad state of the railway, might maintain an action against the company.⁷

§ 518. This principle, or an extension of it, has been a good deal discussed in a case in the House of Lords.⁸ The plaintiffs, a corporation, were empowered by act of

⁴ *Barnes v. Ward*, 2 Carr. & K. 661.

⁵ *Randall v. Cheshire Turnpike Co.*, 6 N. H. 147; *Townshend v. Susquehanna T. Co.*, 6 Johns. 90.

⁶ *Davis v. Lamoille County Plank Road*, 27 Vt. 602.

In the case of *Gibbs v. Trustees of the Liverpool Docks*, 3 H. & N. 164; s. c., 31 Law Times, it was held, in the Exchequer Chamber, reversing the judgment of the Court of Exchequer (1 H. & N. 439), that it is the duty of those receiving tolls, whether as trustees or otherwise, not to allow a dock to remain open for public use, when they know that it is in such a state that it cannot be used without danger, citing *Parnaby v. Lancaster Canal Co.*, 11 Ad. & Ell. 223, and distinguishing the case from *Metcalf v. Hetherington*, 11 Exch. 257. But it seems the party is never liable in such case, unless he knew or might have known of the defect but for his own neglect of duty. *McGinity v. Mayor of New York*, 5 Duer, 674. See *post*, n. 8.

⁷ *Cumberland Valley Railw. v. Hughs*, 11 Penn. St. 141.

⁸ *The Mersey Docks & Harbor Board v. Penhallow*, Law Rep. 1 H. L. 93; s. c., 12 Jur. (N. S.) 571. The recent cases bearing upon the general question of the responsibility of one party for negligence in his own business, which incidentally operates to produce injury to another, and which are here discussed by court or counsel, are the following: *Metcalf v. Hetherington*, 5 H. & N. 719; *Coe v. Wise*, 5 B. & S. 440; s. c., 10 Jur. (N. S.) 1019; *Holliday v. St. Leonard's, Shoreditch*, 8 Jur. (N. S.) 79; s. c., 11 C. B. (N. S.) 192; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Southampton & I. Bridge Co. v. The Local Board of Health*, 8 Ellis & Bl. 801; *Ruck v. Williams*, 3 H. & N. 308; *Whitehouse v. Fellowes*,

Parliament to make and maintain docks for the use of the public, and to take tolls from persons using them. The corporation did not, nor did its individual members, derive any emolument from the tolls, but was bound to apply them in maintaining the docks, and in paying a debt contracted in making them. The corporation had the usual powers of appointing water-bailiffs, harbor-masters, and servants, by whose hands the duties of superintendence were carried out. A ship, in entering one of the docks, struck against a bank of mud left at its entrance, of the existence of which the corporation was either aware, or negligently ignorant. The ship and cargo being both injured, separate actions were brought by the respective owners. It was held, affirming the judgment of the Exchequer Chamber,⁹ that as long as the docks were open for the use of the public, the corporation were bound, whether they received the tolls for private or fiduciary purposes, to

10 C. B. (N. S.) 765; *Brownlow v. The Metropolitan Board*, 8 Jur. (N. S.) 891; s. c., 13 C. B. (N. S.) 768; *Jones v. The Mersey Board*, 11 Ho. Lds. 443; s. c., 11 Jur. (N. S.) 746.

There is obviously considerable conflict in the decisions bearing upon the general question involved. The result of the discussion in the latest case before the court of last resort in England, *supra*, seems to be, that the statute is the only and sufficient warrant for creating any such public work as a railway, harbor, or canal. But the responsibility of those to whom the power is given, depends upon the provisions and construction of the statute; that it is unimportant whether the grantee of the power be a natural or corporate person, the responsibility in either case will be the same; that in the absence of all special statutory provision to the contrary, the builders of such works, and those who operate the same for their own benefit, or that of others, are bound to see that they are constructed with reasonable care and skill, and maintained in the same manner. It was at one time supposed the grantee of such a power might excuse himself from all responsibility by showing good faith and diligence in the discharge of the public duty imposed by the grant of the power. *Sutton v. Clarke*, 6 Taunt. 29, where Chief Justice Gibbs said: "He has done all that was incumbent on him, having used his best skill and diligence." But it has since been held that this is not enough, and that the grantees of such a power are bound to conduct themselves in a skillful manner, and to do all that any skillful person could reasonably be required to do in such a case. *Jones v. Bird*, 5 B. & A. 837.

⁹ 3 H. & Norm. 164, 4 Jur. (N. S.) 636.

take care that the docks were navigable without danger, and consequently that they were liable in damages.

§ 519. It was here held, that in construing statutes creating bodies corporate, such as the plaintiffs, the legislature must be considered, unless the contrary appears, to intend that the corporate body shall have the same liabilities and duties as are imposed by the general law upon private persons doing the same things.

CHAPTER XX.

DISCUSSION OF THE RESPONSIBILITY OF PASSENGER CARRIERS
WHEN DEATH ENSUES.

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| § 520. <i>Distinction between passengers and strangers.</i> | § 522. <i>Negligence of plaintiff.</i> |
| § 521. <i>Distinction further defined.</i> | § 523. <i>Damages.</i> |

THE following very important case we have deemed of sufficient value¹ to be inserted here at length (with our

¹ *State of Maryland v. Baltimore & Ohio Railw., et vice versa*, 24 Md. 84. The Baltimore and Ohio Railroad Company were the owners of a track on Locust Point, in the city of Baltimore, and used a locomotive for the regulation of the trains, picking up empty cars and uniting them to be sent out on the main track. On the occasion in question, a train had been formed in this manner, consisting of many cars, and was being backed at a very slow speed round a curve, on which were houses that prevented the engine-man from seeing the back of the train or the end of the car. Two boys, playing in the neighborhood, who saw the train in motion, ran to get a ride on the last car, catching hold of the bumper, and with their feet on the brake car. A jolt threw one off, and he was killed, while the other was badly injured, losing a part of one hand. It was in proof that these boys had again and again been driven from the cars on other occasions, and their parents informed of their conduct. It was admitted that there was no employee of the company on the end car, and that the engine-man and conductor did not know of the accident till some time after it happened.

The opinion of the court was delivered by

Bowie, C. J. — "These are cross-appeals in an action instituted, under the first and second sections of Article 65 of the Code, by the State for the use of a widowed mother, whose son was killed under the circumstances detailed in the bill of exceptions.

"After evidence was offered by both parties, a series of prayers was submitted by each, all of which were rejected, and other instructions given by the court instead thereof.

"To which rejection, and the instructions given, the plaintiffs and defendants severally excepted.

"The counsel of the defendants having filed in these causes a declaration in writing, that, in the event of an affirmance of the judgment as against the plain-

own comments upon it, in the following chapter), where the following propositions are declared.

tiffs on their appeal in the first case, the defendants will abandon their exceptions, it is proper first to inquire whether the appellants have been aggrieved by the action of the court below.

“The General Assembly of this State, in the year 1852, finding the common-law maxim, “Personal actions die with the person,” unsuited to the circumstances and condition of the people, enacted a law entitled “An act to compensate the families of persons killed by the wrongful act, neglect, or default of another person.” To make its design more obvious, the fourth section provides, “the word person shall apply to bodies politic and corporate,” and “all corporations shall be responsible, under this act, for the wrongful acts, neglect, or default of all agents employed by them.”

“The material provisions of this act, as well as its title, are derived from the 9th and 10th Victoria, and are embodied in Art. 65 (tit. Negligence) of the Code.

“The object of the several series of prayers was: 1st. To furnish the jury with a standard of the care and diligence, required by law of the defendants, to exempt them from liability for damages for the injury incurred. 2d. To prescribe the care necessary to be exercised by the deceased to entitle his next of kin to recover. 3. To define the measure of damages.

“The appellants’ first prayer required the defendants, under the circumstances therein predicated, ‘to exercise the *utmost care and diligence* to prevent accidents endangering the life or lives of the people or inhabitants of the said city.’

“The second held, that the defendants were bound to use all the means and measures of precaution that the highest prudence would suggest, and which it was in their power to employ, and if the use of a guard, or look-out, at the head or in the rear of said cars . . . was a measure by which such accidents would probably be avoided, the omission was culpable negligence.

“The appellants’ third prayer affirms that the jury, in the estimate of damages, should take into consideration the expense to which the plaintiff was subjected in consequence of the accident, and the loss resulting therefrom, not only to the present time, but also the probable prospective loss and expense, etc., and that, in estimating the said loss and damage, the jury are not limited to the actual pecuniary loss provided in said case.

“The propositions laid down by the court, in the first instructions, are:—

“That the defendants, in the movement and management of their cars and engines, were bound to exercise the *utmost care and diligence* which it was within their means and power to employ, to prevent accidents, and injuring or endangering the life or lives of the people, and if the jury find that the child of the plaintiff’s *cestui que use* was run over and killed by the defendants’ cars, as described by the witnesses, and that, if the defendants, in the use and management of their cars and engines, had exercised the *highest degree of care* and diligence ‘which it was within their means and power to employ,’ the said accident could have been prevented, then the plaintiff is entitled to recover in the action; but although the jury may find that the said accident could have been prevented by the use of such care and diligence on the part of the defendants, yet the plain-

§ 520. Railway companies owe a higher degree of watchfulness and care to those sustaining the relation of passenger is entitled to recover if the jury believe the accident could have been avoided by the exercise of that degree of care, by the said child, which was, under all the circumstances, to be naturally and reasonably expected from one of said boy's age and intelligence.

"The degree of care and diligence imposed by law on the defendants, in the instruction given by the court, is as high as that required by the appellants' prayers; the degree is the '*utmost care and diligence*,' the 'highest it was within their means and power to employ'; the only material difference is, that one of the appellants' prayers asked the court to instruct the jury specifically, 'that if the use of a guard or look-out, at the head, or in the rear of said cars, was a measure by which such accidents would probably be avoided, the omission was culpable negligence.' The general terms used by the court embraced all the particulars specified by the prayer of the appellant qualified by the words, 'it was within their means and power to employ.'

"The jury were at liberty to find, under the instruction given, and perhaps did find, that the absence of the guard constituted the want of the 'highest care and diligence within the means and power of the defendants,' and, therefore, rendered their verdict in favor of the plaintiff.

"The liability of the defendants in this case did not depend upon their obligations as carriers of passengers, in which character they are bound 'to use the utmost care and diligence which human foresight can use.' *Stockton v. Frey*, 4 Gill, 406, 422, 423; *Worthington v. Baltimore & Ohio Railroad Co.* (in this court not yet reported). But their liability, if any, arises upon a statute which limits the action to such wrongful act, neglect, or default, 'as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof.' *Vide* Code, art. 65, § 1.

"The party injured not being a passenger, the defendants were not required to exercise that degree of vigilance which the law required toward those with whom there is a relation of trust and confidence, or bailment between the parties. 'Towards the one, the liability of the latter springs from a contract express or implied, and upheld by an adequate consideration. Towards the other, he is under no obligation but that of justice and humanity. While engaged in their lawful business both are bound to use a degree of caution suited to the exigencies of the case.' 8 Barb. 378.

"In an analogous case, this court said: Railroad companies should use 'such care and diligence in using the locomotive upon the road, as would be exercised by skillful, prudent, and discreet persons, having the control and management of the engine, regarding their duty to the company, the demands of the public, and the interests of those having property, and having a proper desire to avoid injuring property along the road.' This was said in a case of injury to property, but is cited with approbation by Redfield as applicable to persons. *Redfield on Railways*, 345, 4 Md. 257.

"The court's instruction did not close with the definition of the degree of care and diligence on the part of defendants, but proceeded to inform the jury, although the accident could have been prevented by the exercise of such care and diligence

gers, than to mere strangers having no fiduciary relations with the company.

by the defendants, yet the plaintiff is not entitled to recover, if the jury believe the accident could have been avoided by the exercise of such care by the child as might, under all the circumstances, have been reasonably expected from one of his age and intelligence. In other words, if there was neglect or default on the part of the boy, or the absence of that prudence which boys of like age and capacity usually exhibit, the defendants were not liable, although, by the exercise of extraordinary care on their part the accident might have been prevented.

“ This ruling is in conformity with all the text-writers, and the great majority of adjudged cases. Redfield on Railways, § 179; 2 Car. & P. 730; 8 C. B. 115.

“ It is objected on the part of the plaintiff below, the appellant in this case, that the court's first instruction was erroneous, in instructing the jury, the action could not be maintained ‘ if the jury believed the accident could have been avoided by the exercise of that degree of care by the said child, which was, under all the circumstances, to be naturally and reasonably expected from one of his age and intelligence.’ Whereas the court should have told the jury the plaintiffs could not recover if the jury found ‘ there was a want of that degree of care on the part of the said child which, under the circumstances, was naturally and reasonably to be expected in one of his age and intelligence.’ The question of the ‘ want of’ or absence of such care, should have been left to the jury rather than the exercise of such care. It is difficult, if not impossible, to perceive the difference between the two propositions. In the court's instructions the proposition is stated affirmatively. In the appellant's objection it is negatively. The jury were to find whether there was or was not due care on the part of the deceased. They are told by the court, ‘ if they believe the accident could have been avoided by the exercise of that degree of care,’ etc., the plaintiff could not recover. The appellant insists that not the exercise, but the want of care (which is the non-exercise of care), is the criterion. The principle of the common law, that a plaintiff cannot recover for injuries to which his own negligence directly contributed, is admitted, and it seems to us it was clearly expressed by the court in the instruction given, as far as the conduct of the deceased child was concerned. In the case of Baltimore & Ohio Railroad Co. v. Lamborn, 12 Md. 257, 261, and Keech's case, 17 id. 32, 46, the rule of the common law, that the plaintiff could not recover for injuries to which his own negligence directly contributed, was held to apply to actions brought on the statutes therein referred to, and the instructions affirmed by the court in those cases submitted to the jury the question of negligence on the part of the plaintiff, as well as on the part of the defendant.

“ The same policy would require the plaintiff to show, in actions for injuries resulting in death, that neither the party injured, nor the parties for whose use the action was brought, had contributed, by neglect or want of care, to the calamity complained of. This omission in the instruction given enured to the advantage of the appellant, and cannot be taken advantage of on her appeal.

“ The objection raised by the plaintiff to the court's second instruction involves the measure of damages. In the language of the brief, ‘ it was erroneous, 1st. Because it ignores the mental sufferings of the mother suing for damages sustained

§ 521. In the former case the utmost care and skill is required, in order to avoid injuries; but in the latter case,

by the loss of the child, and confines her claim to pecuniary damages.' 2d. Because it limits the pecuniary loss of the mother, the *cestui que use*, 'to the minority of the child, and deprives the jury of the right to award her damages for the pecuniary loss she would reasonably sustain in her advanced life for want of the labor and services of the son, even after he reached his majority. The rule should have been to allow what they considered a reasonable compensation.'

"In the absence of any interpretation of this act by our own courts, we must compare and weigh the reasoning of the authorities cited, in which similar acts have been construed by other tribunals.

"First in order are the decisions in England upon the act called Lord Campbell's Act, Redfield, § 179. The observations of Coleridge, J., in the case of Blake, Adm'r. v. The Midland Railw., 18 Q. B. 93; s. c., 10 Eng. L. & Eq. 437, cited by Redfield in his notes, are very strong in support of the instructions given by the court below in this case, confining the jury to the pecuniary damage sustained by the plaintiff. He says: 'Our only safe course is to look at the language the legislature has employed. The title of the acts is for compensating families of persons, etc., not for solacing their wounded feelings.' . . . By the terms of the act, quoting the second section, 'the measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death, to his family.' This language seems more appropriate to a loss of which some estimate may be made, than an indefinite sum, independent of all pecuniary estimate, to soothe the feelings, and the division of the amount strongly tends to the same conclusion.

"As we have before intimated, the title and language of the Act of Assembly of this State are most literally the same with those of the English statute.

"The former contains, also, the provisions for distributing the damages among the surviving members of the deceased family, on which the learned judge relies for adopting the principle of *compensation* for damages which may be estimated in money.

"The American cases, arising upon acts varying in language, necessarily lead, as observed by Judge Redfield, to a diversity of decisions. We have no better guide than the construction of a statute originating in the same policy, and expressed in the same words by enlightened jurists, distinguished for their independence and jealous regard for the rights of suitors.

"It is assumed by the learned author just mentioned, as the conclusion of the best-considered cases in this country, that mental anguish, which is the natural result of the injury, may be taken into the estimate of the damages to the party injured.

"The connection in which this assumption is made, might lead to the inference that it applied to actions brought by *survivors* for injuries done to their deceased ancestor, relative, or next of kin; but upon reference to the authorities cited, it will be seen that the plaintiffs in those cases were the persons sustaining the

only such as skillful, prudent, and discreet persons, having the management of such business in such a neighborhood, would naturally be expected to put forth.

§ 522. The plaintiff cannot recover for an injury resulting from the negligence of the defendant, if, notwithstanding such negligence, he might have avoided the injury by the exercise of care and prudence on his part, or if his own want of such care and prudence, or that of the party injured, in any way contributed directly to the injury.

§ 523. In a case where the mother is to be compensated

bodily harm, and in estimating their damages^{*} their mental suffering constituted an element of compensation. 1 Cush. 451; 10 Barb. 623.

"To have instructed the jury to allow 'what they considered a reasonable compensation,' would, in the language of the Supreme Court of Pennsylvania, 'be giving the jury discretionary power, without stint or limit, highly dangerous to the rights of the defendant, and leaving them without any rule whatever.' *Rose v. Story*, 1 Barr, 190, 197. In the case of *Pennsylvania Railroad Co. v. Kelly*, 7 Casey, 372, the same learned court say:—

" 'Generally speaking, the influence of the court, in this class of cases, should be expected to restrain those excesses into which juries are apt to run. . . . Wild verdicts are frequently rendered. And the tendency, in modern times, undoubtedly is to excessive damages, especially where they are to be assessed against corporations.' *Id.* 379; *The Pennsylvania Railroad Co. v. Rebe et al.*, 33 Penn. St. 318, 330.

"The last objection to the second instruction granted, is that it limits the mother to compensation for loss of her son during his minority only.

"To submit to a jury the value of a life, without limit as to years, would have been to leave them to speculate upon its duration without any basis of calculation.

"The law entitles the mother to the services of her child during his minority only (the father being dead); beyond this, the chances of survivorship, his ability or willingness to support her, are matters of conjecture too vague to enter into an estimate of damages merely compensatory. According to the appellant's theory, the mother and the son are supposed to live on together to an indefinite age; the one craving for sympathy and support, the other rendering reverence, obedience, and protection. Such pictures of filial piety are inestimable moral examples, beautiful to contemplate, but the law has no standard by which to measure their loss.

"This court, being of opinion that the several instructions granted by the court below were as favorable to the plaintiff (appellant) as she was entitled to, and that she was not prejudiced by the rejection of the prayers submitted on her part, finds no error in the rulings of the court below, in the first appeal, and will affirm the judgment."

for the injury or loss consequent upon the death of her infant child, the shock or suffering of feeling is not to be taken into the account, but only the pecuniary loss, and that is not to be extended beyond the minority of the child.

CHAPTER XXI.

COMMENTS ON THE FOREGOING CASE.

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| <p>§ 524. <i>The care and diligence of passenger carriers by railway to be in proportion to its extreme danger.</i></p> <p>§ 525. <i>Where a train is moved in an unusual manner through a populous city, or where it is pushed backwards, there should be a person constantly on the look-out.</i></p> <p>§ 526. <i>The party whose negligence produced the injury is responsible, if he by proper watchfulness might have avoided it, notwithstanding some remote negligence of the other party.</i></p> <p>§ 527. <i>And the fact that the party injured was a trespasser at the time, will not necessarily preclude a recovery.</i></p> | <p>§ 528. <i>But if the party's own fault directly leads to the injury, without which it would not have occurred, he cannot recover.</i></p> <p>§ 529. <i>Sufferings in feeling of the party injured must be taken into account in estimating damages to him for the injury. But the feelings of other parties, incidentally affected thereby, are not to be considered in estimating the loss to them.</i></p> <p>§ 530. <i>Damages may be given on account of the death of a child, for his recovery and the comfort of his society after he shall have come of age; but not for the expenses of the funeral.</i></p> |
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§ 524. THE first proposition maintained in this case is very obvious upon principle as well as upon the decided cases. Where such an amount of passenger traffic as is now done by railways is confided to agents operating by means of so powerful and dangerous an element as steam, no state or country could fairly justify any rule of responsibility except that of the utmost practicable watchfulness, skill, and ability. And no doubt these considerations, connected with the nature and extent of the business of railways, will justify a demand that their business shall be so conducted as to give fair and just opportunity for the conduct of other legitimate business, more or less interfering with that of the company, with reasonable security. The rule, as stated in some of the earlier cases, in regard to railways, is that they should be so conducted, with reference to other busi-

ness interests, that all may have proper scope and reasonable opportunity to escape detriment; the same as if the company owned both interests, and desired the success of both.¹ This rule, as we have often attempted to show, will apply with great stringency to any business which is more than commonly liable to destroy life or property. Prudent men always measure their care and diligence by the exigencies of the business and the occasion. Hence it was held, in an early case in California,² that where the track of a railway intersects the thoroughfares of a city, the companies are bound to exercise extraordinary care not to injure persons in the streets.

§ 525. Accordingly in the present case, it is probably true, as suggested by the court, that where a company push a train of cars backwards through the streets of a city, they would be bound to have a servant so stationed that he could look out for persons or property exposed to injury, and who could either himself stop the train or give signal to some one for that purpose in time to prevent collision and damage. But this is not a question of law altogether, and would ordinarily have to be passed upon by the jury. We have discussed this general question of diligence and negligence, both as to the principles involved and the cases bearing upon it, in *Taylor v. Briggs*,³ more in detail than would be proper here.

§ 526. In regard to the effect of general negligence in the party to whom the injury occurs, remotely exposing him to the injury, but forming no part of the proximate cause of the same, the cases are numerous, and at the present day reasonably concurrent in the result, that unless the want of due care on the part of the party injured, or of those responsible for the conduct of such party, contributed directly to the production of the injury, the other

¹ *Quimby v. Vermont Central Railw. Co.*, 23 Vt. 387.

² *Wilson v. Cunningham*, 3 Cal. 241.

³ 28 Vt. 180.

party will be responsible, provided his negligence was the efficient cause of the injury, and, with the exercise of proper care, he might have avoided inflicting it, notwithstanding the general want of proper watchfulness by the party injured. The cases are too numerous upon this point to be quoted in detail.⁴

§ 527. And it seems that the fact that the person or property, as cattle, are trespassing at the time the injury occurs, will not subject them to damage without redress, provided there is no such wrong on the part of the person, or of the owner of the property, as to contribute directly to the injury, so that the other party might not, with ordinary care, have avoided it.⁵

§ 528. But where the negligence of the party injured, in any manner or to any extent, contributed directly to the production of the injury, however slightly; and without such fault on his part it would not have occurred, there can be no recovery.⁶ So in a very late English case, where the party finding the gates at a crossing negligently closed in the night time, after every exertion to find some servant of the company to open them, necessarily opened the gates himself in order to pursue his journey, and where, without any fault on his part, the gate swung back by its own weight and struck the horse, which became unmanageable, whereby the plaintiff was thrown out of the carriage and injured, it was held he could not recover, inasmuch as

⁴ *Davies v. Mann*, 10 M. & W. 546; *Illidge v. Goodwin*, 5 C. & P. 190, are the leading English cases. The American cases will be found, in almost all the States, to have maintained the same view. *Trow v. Vermont Central Railw.*, 24 Vt. 487; *Isbell v. N. Y. & N. H. Railw.*, 27 Conn. 393; *Kerwhacker v. C. C. & C. Railw.*, 3 Ohio (N. S.) 172; *C. C. & C. Railw. v. Elliott*, 4 id. 474. The rule is very broadly stated in *New Haven Steamboat & Transportation Co. v. Vanderbilt*, 16 Conn. 421.

⁵ *Isbell v. N. Y. & N. H. Railw.*, *supra*; *Daley v. Norwich & Worcester Railw.*, 26 Conn. 591; *Brown v. Lynn*, 31 Penn. St. 510; *C. C. & C. Railw. v. Terry*, 8 Ohio (N. S.) 570.

⁶ *Witherly v. Regent's Canal Co.*, 12 C. B. (N. S.) 2; s. c., 3 F. & F. 61.

he had no right to open the gates himself, and the injury was produced by his own wrongful act in doing so.⁷

§ 529. The question of damages is one in regard to which, for a time, the cases seemed to vacillate somewhat upon the point whether the manner of the infliction of the injury and the shock to the feelings of those near relatives for whose benefit the action was brought, could be taken into the account. It seems very clear that where the suit is for the benefit of the very person sustaining the injury, there could be no question that any shock or injury to his feelings, any mental suffering, which was the direct consequence of the injury, should be considered in estimating damages. Such suffering is a part of the necessary labor to be borne by the party injured, in consequence of the injury.⁸ But in estimating damages to other parties, affected incidentally by the death of the party injured, it seems now pretty generally conceded, that no account of wounded feelings can be taken. And this, upon the whole, seems but just and reasonable. For there would be no uniformity in cases of this kind if the jury were allowed to go into considerations so remote and uncertain.⁹

§ 530. There is one qualification in regard to the extent to which damages were allowed to be given by the jury in the principal case which has not generally been adverted to, and which seems to us somewhat liable to misconstruction. We refer to the restriction limiting prospective damages to the minority of the child. It has been decided that a father may recover pecuniary damages for the death of a son twenty-seven years of age, unmarried, and who has been accustomed to make occasional presents to his parents.¹⁰ And it was here held, as it has often

⁷ *Wyatt v. Great Western Railw.*, 6 B. & S. 709; s. c., 11 Jur. (N. S.) 825.

⁸ *Canning v. Williamstown*, 1 Cush. 451; *Morse v. Auburn & Syracuse Railw. Co.*, 10 Barb. 621.

⁹ *Penn. Railw. Co. v. McCloskey*, 23 Penn. St. 526. So in *North Penn. Railw. Co. v. Robinson*, 44 Penn. St. 175, it is said the value of the life lost, estimated by a pecuniary standard, is what is to be recovered.

¹⁰ *Dalton v. Southeastern Railw. Co.*, 4 C. B. (N. S.) 296.

been in other cases, that the jury could not give damages by way of compensating the father for the expenses of his son's funeral or for procuring family mourning.¹¹ It was lately held in the Exchequer Chamber,¹² that where, in consequence of the death of the father, his income was, by direction of his will, unequally distributed among his widow and children, the eldest son taking most of it, that damages might be recovered for the benefit of the whole class on that ground, some of the children being thereby deprived of an expected support, had the life of the father continued. In the very late English case of *Boulter v. Webster*,¹³ the Court of Queen's Bench adhered to the rule that no damages could be awarded to the parent by reason of the death of his child, on account of the expenses of the funeral.

¹¹ See also *Franklin v. Southeastern Railw. Co.*, 3 H. & N. 211; *Blake v. Midland Railw.*, 18 Q. B. 93.

¹² *Pym v. Great Northern Railw.*, 4 B. & S. 396; s. c., 10 Jur. (N. S.) 199.

¹³ 13 W. R. 289.

CHAPTER XXII.

FAULT OF PARTY INJURED. — FREE PASS.

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| <p>§ 531. <i>Where a passenger is injured on a railway the primâ facie presumption is, that it resulted from the want of due care on the part of the company.</i></p> <p>§ 532. <i>But, nevertheless, it is competent to prove the damage occurred without their fault.</i></p> | <p>§ 538. <i>One who rides upon a free pass, or in the baggage-car, is not thereby deprived of his remedy against the company for injuries received through their want of due care, provided he was at the time a passenger and without fault on his own part.</i></p> |
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THE above points, decided by a court of ability, and the opinion in which the several propositions were very carefully illustrated, with our own comments upon them, appear to us proper to be inserted here, as the clearest exposition of our own views, upon the questions involved, which we could give. The propositions were declared by the Supreme Court of Missouri, in the case of Hannibal and St. Joseph Railroad Company *v.* Hattie Higgins, by Eliza Higgins, her guardian:¹ —

§ 531. The statute of Missouri giving a remedy to the representatives of a passenger killed upon a railway train, goes upon the same principle which before obtained in regard to injuries to passengers, that such injury or death *primâ facie* results from want of due care in the company.

§ 532. The presumption is not conclusive under the statute, but may be rebutted by evidence of the cause of the injury. One who had been in the employment of the company as an engineer and brakeman, until his train was dis-

¹ 5 Am. Law Reg. (N. S.) 715 - 721; 36 Mo. 418.

continued a few days previously, and who had not been settled with or discharged, although not actually under pay at the time, and who signalled the train to take him up, and who took his seat in the baggage-car with the other employees of the company, and paid no fare and was not expected to, although at the time in pursuit of other employment, cannot be considered a passenger. If he would secure the immunities and rights of a passenger, he should have paid his fare and taken a seat in the passenger-car.

§ 533. It will not deprive of his remedy a passenger who comes upon the train in that character, and is so received, that he is allowed as matter of courtesy to pass free, or to ride with the employees of the road in the baggage-car. But a passenger who leaves the passenger carriages to go upon the platforms or into the baggage-car, unless compelled to do so for want of proper accommodations in the passenger carriages, or else by permission of the conductor of the train, must be regarded as depriving himself of the ordinary remedies against the company for injuries received, unless upon proof that his change of position did not conduce to the injury.²

² This opinion was delivered by *Holmes, J.*, who is at present one of the professors in the Harvard Law School: "The plaintiff below, an infant and only child of Thomas G. Higgins, who was killed while riding in a baggage-car on the Hannibal and St. Joseph Railroad, on the 16th day of September, 1861, brings this suit. The widow having failed to sue within six months to recover the \$5,000, which are given by the second section of the act concerning damages (Rev. Stat. 1855, p. 647) where any passenger shall die from an injury resulting from or occasioned by any defect or insufficiency in any railroad.

"The petition is evidently framed upon that act, though the statute is not named or referred to by any express words. It contained two counts: one founded upon the second section, and the other upon the third section of the act.

"The verdict was for the plaintiff upon the first count, and for the defendant upon the second count; and the damages were assessed at \$5,000. The defendant's motion for a new trial was overruled. The case came up by appeal, and stands here upon the first count only.

"The clause of the act on which this first count is founded relates exclusively

to passengers, and to the cases of injury and death occasioned by some defect or insufficiency in the railroad. This statute makes the mere fact of an injury and death resulting from a cause of this nature, a *primâ facie* case of negligence and liability on the part of the defendant, as a presumption of law. It is not a conclusive presumption, but disputable by proof, that such defect or insufficiency was not the result of negligence, nor does it preclude any other defense of a different nature. The act is to be interpreted and construed with reference to the state of the law as it stood before its passage. By the general principles of law, which were applicable to common carriers of passengers and to persons standing in that relation, the fact of an injury to a passenger, occasioned by a defective railroad car or coach, or by a defect in any part of the machinery, makes a *primâ facie* case of negligence against the defendant sufficient to shift the burden of proof; and by that law carriers of passengers were held responsible for the utmost degree of care and diligence, and were liable for the slightest neglect. This act is evidently based upon the same principles: it is confined by its terms strictly to passengers and to injuries arising from cases of that peculiar nature only; and it must receive a construction in accordance with these principles. Viewed in this light, it is clear that the intent of this clause of the act was to provide greater security for the lives and safety of the passengers as such, and to enable the representatives of a deceased passenger to pursue the remedy given by the act; and no other class of persons is intended within its purview.

"The first question here presented is, whether the deceased person was a passenger within the meaning of the act. The evidence shows he had been in the employ of the company as an engineer and brakeman for several years, with some intermission; that for several months previous to the accident, and down to the 4th day of September, 1861, when his train was stopped by guerillas, he had been continually on duty as a brakeman; and that, about that time, the interruptions occasioned by actual hostilities in that neighborhood had caused the train on which he was employed to cease running for a time; and that for several days before the day of his death he had not been in actual service upon any train, but his name still remained on the roll of the company's employees as before. He had never been paid off and discharged; his account was unsettled; there were arrears still due him at the time of his decease. It appears brakemen were paid monthly, but at the rate of so much per day for as many days as they actually worked during the month.

"These facts would all go to show that his employment still continued, and that his relation to the company was still that of an employee. On the morning of the accident he signalled the train to stop, and take him up where he was; he took his place on the baggage-car among other employees; he appears to have treated himself as an employee, and was treated by the conductor as an employee who was passing from one point to another on the road in the usual manner. He engaged no passage, took no seat in any passenger-car, paid no fare, and evidently did not expect to pay any; and none was exacted from him. He did not claim to be a passenger, nor was he treated otherwise than as an employee by the conductor. Upon a careful examination of the evidence on this point, we think it tended to prove that he was an employee, and not a passenger within the purview of this act, and that under all the circumstances the conductor had a right to presume he was travelling as an employee of the company merely.

"Such being the relation of the parties, the mere circumstances that he had been off duty as a brakeman for some days, or that he was then passing on his own private errand, and not immediately engaged on the business of the company or in running that very train, cannot be allowed to make any difference: *Gilshannon v. Stony Brook Railw. Co.*, 10 Cush. 228. The conductor, knowing him only as an employee, was not bound to inquire into his particular errand; and though informed, by a casual conversation with him in the baggage-car, that he was looking for some temporary employment so as not to lose time, he still might be justified as treating him as an employee who had the privilege of free passage on the train as such. Under such circumstances it was his business, if he claimed to be a passenger, to engage or take a seat in the passenger-coach, or at least in some way to make it known to the conductor that he claimed to be travelling in the character of a passenger.

"Where a director was invited by the president to pass over the road as a passenger, without paying fare: *Philadelphia & Reading Railroad Co. v. Derby*, 14 How. (U. S.) 468; where a man was taken up by the engineer of a gravel-train, to be carried as a passenger, paying fare as the practice had been, and was allowed to go from the tender to the gravel-car: *Lawrenceburg & Upper Mississippi Railroad Co. v. Montgomery*, 7 Ind. 474; and where a man who had been a work-hand on the road, but had left the service of the company two weeks before the accident, because they did not pay him, got upon the train to be carried as a passenger: *Ohio & Mississippi Railroad Co. v. Muhllins*, 30 Ill. 9; and where a house-carpenter was employed to build a bridge, and was sent by the company on their cars to another place to assist in loading timber for the bridge: *Gillenwater v. Madison & Indiana Railroad Co.*, 5 Ind. 340; the injured person was held to be clothed with all the right and character of a passenger and a stranger; and that he was not to be considered as standing on the same footing as ordinary employees and fellow-servants of the company.

"If this party had been invited to go in the train as passenger, or had taken a seat in the passenger-car, or had been taken on board the train in the character of a passenger, and the conductor had merely waived his right to demand fare as an act of liberality or courtesy, and had then allowed him to pass into the baggage-car to ride there, the case would have been quite different, and might have fallen within the reasoning and the principles of these adjudicated cases. The benefit of this act was plainly intended for those only who stand, strictly speaking, in the relation of passengers, and between whom and the carrier there exists the privity of contract, with or without fare actually paid, and the peculiar responsibilities which are implied in that relation and depend wholly upon it. Where the relation is properly that of master and servant only, this particular clause of the act has no application. We think this matter was not fairly nor correctly laid before the jury by the instructions of the court below.

"Again, even if the deceased party would be considered as having been in any proper sense a passenger, there would not be the least doubt that he himself neglected all precautions and voluntarily placed himself in a position which he knew to be the most dangerous on the train for passengers. A baggage-car is certainly no place for a passenger, and as such the proof shows he had no business to be there at all. We are aware that it had been held in some cases, that if a passenger, who is travelling as such, is allowed to go into the baggage-car or

into a part of the baggage-car which is used as a post-office, where passengers are sometimes permitted to be, as in *Carrol v. New York & New Haven Railroad Co.*, 1 Duer, 571, and while there an accident and injury occur, by reason of negligence on the part of the company, and under such circumstances that his being in that place cannot be said to have materially contributed to produce the accident or injury, the defendant would still be held liable. In many cases of this kind, it might be difficult to determine whose negligence had been the real cause of the injury.

“But any question of this nature is removed from our consideration in this case by force of another statute which finds an apt and just application here.

“By the 64th section of the Act concerning Railroad Associations, Rev. Stat. 1855, p. 430, approved one day only after the act in question, it is expressly provided as follows:—

“‘In case any passenger on any railroad shall be injured while on the platform of a car, or in any baggage, wood, or freight-car, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger-cars, then in the train, such company shall not be liable for the injury. Provided, said company at the time furnish room inside its passenger-cars sufficient for the proper accommodation of its passengers.’

“This provision is by the 57th section of the same act made applicable to all existing railroads in this State: *ibid.*, p. 438. Under this section the exemption of the company is made to depend upon a violation by the passenger of the printed regulation hung up in the passenger-cars only. They are not required to be posted up in a baggage-car: it is presumed that no passenger will ever be found there. There was evidence in the case tending to prove that the provision of the statute had been complied with on the part of the defendant; but the printed forms used had been changed since that time, and no copy of the former cards had been found, and on proof made of the loss of them secondary evidence was offered to prove their contents. This evidence was excluded as irrelevant and having no bearing upon the case. In the view we have taken of this statute the evidence was certainly very material and should have been admitted. It is true such notice would have given this party no information, for the reason he did not go in the passenger-car; the evidence tended to show that he was in fact well acquainted with these regulations; and this consideration, so far from weighing anything in his favor, would rather tend to strengthen the inference that he was not a passenger at all. This statute proceeds again upon the general principles of law in relation to contributory negligence, and it supposes that a passenger who has had the warning of this notice, and yet has placed himself in a situation so dangerous as a baggage-car, is to be considered as contributing by his own negligence to produce the injury, and therefore that the company is not to be held liable in such cases.

“We think that the first and second instructions asked for by defendants should have been given, and that the fifth, sixth, and seventh instructions asked for by plaintiff should have been refused. It is not deemed necessary more particularly to notice the other instructions.”

The foregoing opinion seems to us to present several interesting practical points, in a very judicious and sensible light. It is sometimes difficult to determine, with exact precision, when a person ceases to be an employee of the road

and becomes a passenger. There is perhaps no fairer test than the one presented in this case, to allow his own claim and conduct at the time, and the acquiescence of the company, to determine that question. At the time, one who has recently been in the employment of the company has a motive to claim the privileges of the employment, by passing without the payment of fare. And if he claims the privilege, and it is acceded to by the officers of the company, there is great injustice in allowing the person at the same time to hold the company to the higher responsibility which it owes to passengers, from whom it derives revenue. It should therefore be made to appear, that one who passes in the character of an employee of the road was really a passenger, before he can fairly be allowed to demand the indemnity which passengers may by law require. If the person assumes one character for his advantage, and the company accede to the claim, he ought not to be allowed the benefits of any other character, unless it is very clear such was his real position, and that this was understood by the company.

The effect of free passes, and of the passenger being out of his place in the carriages, is very fairly presented, as it seems to us, in the foregoing opinion, and the principal cases are referred to upon all the points.

CHAPTER XXIII.

RAILWAY MANAGEMENT AND RESPONSIBILITY.

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| <p>§ 534. <i>The distinction between the responsibility of common carriers, and passenger carriers, rather formal than substantial.</i></p> <p>§ 535. <i>Passenger carriers bound to furnish themselves with every security known to the business, or else the risk caused by any deficiency rests upon them.</i></p> <p>§ 536. <i>People in foreign countries cannot comprehend our rashness in passenger transportation by railway.</i></p> <p>§ 537. <i>Comparison of the precautions abroad with those used here. The courts</i></p> | <p><i>should be more stringent in their demands upon this subject.</i></p> <p>§ 538. <i>Those who voluntarily submit to destruction, as well as those who perpetrate it, should not go unpunished.</i></p> <p>§ 539. <i>The instinctive sentiments of juries in holding railway passenger carriers responsible for all injury to passengers, wise and just.</i></p> <p>§ 540. <i>It is not safe to affirm, that passenger carriers are absolutely bound to safe delivery, at the point of destination. But the rule of law, properly understood and justly applied, falls scarcely short of this.</i></p> |
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§ 534. THERE is one subject connected with railway management and responsibility to which we desire to devote some consideration here. We refer to the exact limits of responsibility, and the precise measure of care and diligence which the law imposes upon, or requires of, passenger carriers by railway. We have been so long accustomed to define this diligence and responsibility by reference to, and comparison with, that of common carriers of goods, and to consider the former as of an inferior degree, as compared with the latter, that it seems to us the profession are not fully sensible of the real extent of the responsibility which the law imposes upon railway passenger carriers. The more we have studied and attempted to define this distinction between the degree of responsibility imposed upon railway passenger carriers and common car-

riers of goods, the more clearly we have felt that the difference is rather formal than substantial. The cases all agree, that passenger carriers by railway are bound to the utmost diligence which human skill and foresight can effect, and that if injury occurs by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the damage occurs, the carrier is responsible, as well in the case of passengers as of goods. In the latter case it is said that the carrier is absolutely bound to safe delivery, and not in the former. But in the case of goods, the carrier is excused for loss or damage occurring from the misconduct of the owner, either in package, or storage or stowage, or in regard to any other thing when he assumes to act, or direct, on his own responsibility. And he is not responsible for damage occurring from inevitable accident or irresistible force, or, as it was formerly said, for those results which follow from the act of God or the king's enemies.

§ 535. And when we admit all these excuses for passenger carriers, there remains very little, or nothing more which the law recognizes as an adequate excuse for any damage occurring during the transportation. We are accustomed to suppose that damage occurring from the want of more perfect appliances for passenger transportation, is not chargeable to the carrier; and we are not aware that this precise point has been decided. It is, indeed, not always easy to determine precisely the effect of any particular defect existing in the appliances in actual use upon any particular line of railway where damage occurs, and what might have been the exact result if the appliances had been as perfect as possible. And so, too, of the management of the particular train, at the time the injury occurred, it is not always a point upon which skilled and experienced men agree, what might have been done more or different from what was done to insure safety. And

there are many that suppose the passenger assumes all the risks resulting from such deficiencies as are apparent to all, and therefore presumably known to him. As for instance, when it can be shown, with reasonable certainty, that if there had been a double track no damage could have occurred at the time, or in the mode in which it did, the opinion is not uncommon, we believe, that this will not fix the responsibility of the carrier; but we consider this opinion to be altogether erroneous. For if this view can be entertained, and carried to its logical results, it will go a long way towards excusing passenger carriers for all damage which is not the result of some degree of negligence at the very time it occurs.

§ 536. For if railway companies may excuse themselves from responsibility for damage to passengers, by proving the most obvious and criminal defects in the construction and equipment of their roads, or in the use of the commonest precautions to insure safety, there will be no security for railway passengers. We must either eschew railway travelling altogether, or else understand, that in entering a railway carriage, we take our lives in our own hands. It would almost seem that the railway managers in our country have adopted some such theory of absolute immunity from all responsibility, or they would not dare expose their passengers to such awful perils. It is but just to say, that the barbarous and inhuman sacrifice of such multitudes as has occurred, in repeated instances, in our country during the last few years, presents a problem which it is quite impossible for people in other countries to solve, and for which it is not easy for the most friendly disposed to invent any sufficient apology or excuse.

§ 537. And when we reflect how these things are managed in England, by means of actual signals from station to station, showing a clear track before any train is allowed to pass; and especially in some of the continental

countries, like Austria and Bavaria, and other German States, and elsewhere, where electric telegraphic stations are maintained at very short intervals, with operators whose sole employment is to know that all is right on the advancing line, and to bow the trains along by the graceful touch of the hat as they pass: When we pass along these lines, with double track throughout, and a perfect road-bed and superstructure and equipment, and all these telegraphic precautions in addition, we cannot but feel surprised that public opinion in America will tolerate such terrible destruction of life, such horrid mangling of bodies and limbs, and literal burning alive, as has occurred here within the last few years. One feels the inexcusable character of these outrages more keenly while surrounded by those who are so incapable of comprehending how it is possible for them to occur. We hope the time is not very remote when our courts will be able to place themselves upon the proper theory on this subject, that any person, natural or corporate, who undertakes the transportation of passengers by the dangerous element of steam, and with the great speed of railway trains, must be held responsible for the use of every precaution which any known skill or experience has yet been able to devise, and that passengers are not bound to judge for themselves how many of these precautions it is safe to forego.

§ 538. It is no excuse that the public desire cheap and rapid travelling in all directions and everywhere. We do not allow every one, at will, to build railways, and to manage them in his own way; and if the government professes to control these matters at all, it is bound to do it effectually. And if it were made a matter of national supervision, it would be much easier to do so, and thus prevent these daily tragedies, which we have almost ceased to regard in consequence of their frequency. We do not allow monomaniacs or brigands to commit suicide or murder without interference, because it is their pleasure or their

interest to do so ; and we see no good reason why railway passengers, or railway managers, should be allowed to roast a hecatomb, in human sacrifice, because it seems convenient or desirable to the one or the other class concerned in the immolation, or because the one class demands and the other consents to use a mode of passenger transportation which inevitably produces these results.

§ 539. The truth is, that common juries, with their higher instincts of justice, have always, in our country, been accustomed to view the matter of railway responsibility for passenger transportation, in the light of higher and fuller responsibility than either the courts or the profession. It is not uncommon to hear it objected, in our country, against the reason or justice of jury trials, that the result is always the same in all actions for injuries to passengers on railways ; the companies are sure to be cast in the actions, and this seems to be regarded as an unanswerable reproach. But when we reflect how much more might be done, in all such cases, to secure perfect safety and exemption from injury ; and how much more really is done, both in Great Britain and on the continent of Europe, we can only conclude, that the common-sense instincts of jurors have raised them to a higher plane of wisdom and justice than that which the courts, or the profession, have yet attained.

§ 540. We do not feel prepared to say that a railway company which undertakes the transportation of passengers, is absolutely bound to safe delivery, the same as common carriers of goods, inevitable accident, irresistible force, and the misconduct of the party only excepted ; but we must confess, in all sincerity, that the distinction which we have all taken so much labor and pains to maintain, between these two classes of carriers, is rather shadowy and unsubstantial ; and it seems to us that since the introduction of railways we are able to comprehend more fully, that the distinction is really without much just foundation.

If no railway company is to be excused for any injury occurring to its passengers, until the company has done all that it was in its power to do to guard against the occurrence of injuries of that character, it will be a long time before we shall hear the repetition of the charge as a reproach, that juries always find against railway companies in such cases. They will be expected to find so. And for one we shall expect that all the excepted cases will soon be reduced to those which exist in the case of common carriers of goods. For if railway passenger carriers are bound to do all for the security of their passengers which human care, skill, and diligence can effect, and if this is to be measured by what is known and done in like cases throughout the world, and the passenger is not presumed to exercise any judgment upon the subject, unless or until he consents, in terms, expressly to assume some portion of the risk himself, or constructively does so by violating the regulations of the company, as by needlessly exposing his person, we do not see but the carrier must show, in order to excuse an injury to a passenger, that it resulted from inevitable accident or irresistible force, or was the fault of the passenger. If the carrier is bound to do all that it was possible to have done to prevent the occurrence of injury to his passengers, and really performs his duty, and injury still occurs, it must of necessity be an occurrence in the nature of things inevitable or irresistible.

PART IV.



TELEGRAPH COMPANIES.

PART IV.

TELEGRAPH COMPANIES.

CHAPTER I.

THEIR RIGHTS, DUTIES, AND RESPONSIBILITIES.

- § 541. *The ordinary corporate rights and duties of these companies discussed elsewhere.*
- § 542. *The chief inquiry, as to third parties, is, which shall assume the risk of transmitting a message.*
- § 543. *Telegraphic communications must be proved by production of the original, or in default of that, by copy, etc.*
- § 544. *Questions will arise whether the message delivered to the operator, or that received, is the original.*
- § 545. *If the party sending the message is the actor, that received at the end of the line is the original.*
- § 546. *But a mere reply, or message sent on behalf of the person to whom sent, is the original, when delivered to the operator.*
- n. 4. *Discussion of these points in a case in Vermont.*
- § 547. *Where both parties agree to communicate by telegraph, each assumes the risk of his own message.*
- n. 5 and 6. *Discussion of the question of making contracts by telegraphic communication.*
- § 548. *Illustration of the question of resemblance or difference between correspondence by mail and by telegraph.*
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- § 551. *Notice that company will not be responsible for mistakes in unrepeatd messages binding.*
- § 552. *The American courts adopt the same view. Company always responsible for ordinary neglect.*
- § 553. *Companies can only be regarded as insurers of the accuracy of repeated messages.*
- § 554. *Held responsible in one case where specially cautioned.*
- § 555. *But, generally, not responsible for errors in unrepeatd messages, except on proof of negligence or want of skill.*
- § 556. *Telegraph companies not responsible as common carriers, and may limit responsibility to their own lines and to repeated messages, if not guilty of negligence.*
- n. 10. *Discussion of the question, how far telegraph companies are common carriers.*
- § 557. *Case in Kentucky, holding the company responsible only for care and skill in unrepeatd messages.*

- § 558, and n. 16. *Discussion of the question of responsibility for messages passing over different lines.*
- § 559. *Statement of some suggested difficulties in establishing a proper rule of damages in such cases.*
- § 560. *All that is required to render the business safe is to understand the messages correctly.*
- § 561. *The ordinary rule of damages applicable to contracts should be applied here.*
- § 562. *The fact that such correspondence is not fully understood by the companies will make no essential difference in the application of the rule.*
- § 563, and n. 21. *Party on discovering mistake must elect whether to adopt it or not.*
- § 564. *Rule of damages adopted in some unreported cases.*
- § 565, and n. 23. *The party entitled to recover penalty is the contracting party.*
- § 566. *The duty to serve all, without discrimination or preference. Disclosing secrets of office.*
- § 567. *Several miscellaneous points decided by the cases.*
1. *Placing poles in the highway, without legislative authority, creates a nuisance.*
 2. *And telegraph companies, having legislative powers, must see that their works do not obstruct the highway, to the injury of ordinary travellers.*
3. *Shipmasters are bound to know of the existence and situation of submarine cables, and not to injure them.*
4. *The duty of secrecy in regard to telegraphic correspondence important and difficult to secure.*
5. *How far treasury notes are lawful tender for rent of telegraph line, agreed to be paid in United States currency.*
6. *Telegraph posts, once legally established in the highway, cannot afterwards be removed or treated as a public nuisance.*
7. *Atmospheric influences, or unintelligible nature of message, how affecting damages.*
8. *Liberal constructions in proving telegraphic communications.*
9. *Morse's patent vindicated.*
- § 568. *An elaborate review of numerous points of law upon the subject.*
- § 569. *Powers of courts of equity in vindicating the exclusive rights of such companies.*
- § 570. *Duty of companies to transmit messages promptly and fairly.*
- § 571. *Numerous points decided in another case.*

THE importance of telegraph companies to the business interests of the country seems to require that the profession should be able to find ready access to the decided cases bearing upon those interests, whether having reference to those of the companies or of the public. And the intimate connection between the railways and telegraphs, as well as the similarity of the changes wrought in business operations by each, seem to justify the expectation that the law applicable to both should be combined in the same treatise. These considerations have induced us to here insert the leading propositions hitherto declared in the courts, both in England and America, bearing exclusively upon the rights, interests, and duties of telegraph companies.

§ 541. We have in our work on the law of railways considered most of the questions bearing upon the rights and duties of telegraph companies, as corporations, requiring to take land compulsorily for their construction, since these questions do not differ materially from those which arise in the construction of railways.¹

§ 542. The questions in regard to telegraph companies which have an exclusive bearing in that direction must naturally be expected to have chief reference to their duty in accurately transmitting messages; the mode of proof, and which party, as between third persons, takes the risk of any want of accuracy in such communications. These points are somewhat considered in a case in Vermont, decided at a comparatively early day, before much had been settled by the courts in regard to them.²

§ 543. It is here declared, that where a telegraphic communication is relied upon to establish a contract, it must be proved as other writings are, by the production of the original. If that is lost it may be proved by a copy, or, in default of that being obtainable, by oral testimony. But it has been held, that where the principal portion of the contract is settled by oral communication between the parties, and the telegraph is resorted to for the purpose of settling some incidental matters connected therewith, the contract will be susceptible of proof by oral evidence, and the telegram is to be received as proof of the particulars settled thereby.³

¹ Railways, §§ 1-123. But at the time of the publication of the former editions of this work telegraph companies were only in the state of early infancy, and the courts had decided very little upon points having exclusive reference to those companies, either in regard to their internal or external interests. The extension of the lines to every part of the world, and the large amount of business transacted, more or less by means of such communication, will, at no distant period, render this one of the leading commercial interests, and may engross a large portion of ordinary correspondence, thus compelling the national government to assume its exclusive control as a postal agency.

² *Durkee v. Vermont Central Railw.*, 29 Vt. 127. See also *Matteson v. Roberts*, 25 Ill. 591, where it is held that a copy of a telegram is not evidence, the original should be produced or its absence accounted for.

³ *Beach v. Raritan & Delaware Bay Railw.*, 37 N. Y. 457. There is a some-

§ 544. Questions may arise in regard to what is to be regarded as the original, in communications transmitted by telegraph; whether the written message delivered to the operator, at the office from which sent, or the copy of the despatch delivered by the office at which it was ultimately received.

§ 545. This will depend upon which party takes the risk of transmission; in other words, whose agent the telegraph becomes in the transmission. Where the party sending the message is the responsible party, acting on his own behalf, or on behalf of a principal, who desires to send the message to give information which he desires to have acted upon, or to obtain a reply, with a view to initiate a contract, the message delivered at the end of the line is the original.

§ 546. A mere reply, without new conditions, or a message which the party to whom it is sent desires to have sent and consequently takes the risk of transmission, becomes the original when delivered to the operator, and cannot strictly be proved except by itself. But where the papers on which the original messages are written and delivered are not preserved, after being entered in the books of the company, the first copy made becomes the best proof of the original. Our own view will be best presented in the language used in delivering the opinion in the case ² last cited.⁴

what remarkable decision in *Williams v. Birkett*, 37 Miss. 682, that the person to whom a telegram is directed is not competent to prove its contents, without accounting for its loss and proof that the author sent it, but the admission of the alleged writer that he did send it and of its contents, is competent.

⁴ "In regard to the proof offered to establish telegraphic communications, it seems to us that where such communications are relied upon to establish contracts, where their force and effect will depend upon the terms used, they must be proved in the same manner as other writings, such as letters and contracts, are. For a telegraphic communication is ordinarily in writing in the vernacular, at both ends of the line, and must of necessity be so at the last end, unless the person to whom it is addressed is in the office at the time, which is sometimes the fact. In such case, if the communication were never reduced to writing, it could only be

§ 547. In a recent case in New York⁵ it is held, that where the parties have agreed that the communications

proved, like other matters resting in parol, by the recollection of witnesses in whose hearing it was repeated. In regard to the particular end of the line where inquiry is first to be made for the original, it depends upon which party is responsible for the transmission across the line, or in other words, whose agent the telegraph is. The first communication in a transaction, if it is all negotiated across the wires, will only be effective in the form in which it reaches its destination. In such case inquiry should first be made for the very despatch delivered. In default of that, its contents may be shown by the next best proof.

"If the course of business is to preserve copies of all messages received in books kept for that purpose, a copy might readily be obtained which would ordinarily be regarded as better proof than the mere recollection of a witness. And according to the early English and the American practice, the party is bound to produce a copy of the original (that being lost) when in his power, and if he have a sufficient time before the trial to enable him to do so. 1 Greenleaf Ev., § 84, and note. And perhaps if no copy of such message is preserved, but the original message ordered to be sent is preserved, that should be produced, although this was not strictly the original in the case, the letter delivered, which was the original, being lost.

"But where the party to whom the communication is made is to take the risk of transmission, the message delivered to the operator is the original, and that is to be produced, or the nearest approach to it by way of copy or otherwise."

⁵ *Trevor v. Wood*, 41 Barb. 255; s. c., reversed 36 N. Y. 307. The rule in regard to contracts by correspondence through the mail is well settled. Where one makes an offer and requires a reply by mail, the contract is closed the moment the reply is mailed, or deposited in the authorized place of deposit for letters in the post-office or elsewhere for the mail. *Vassar v. Camp*, 1 Kernan, 441; *Taylor v. Merchants' Ins. Co.*, 9 How. 390. But these and all similar cases go upon the ground that the person making the offer, directs, by implication, that the reply to his proposition shall be made through the mail, and that when it is so accepted the contract shall be considered as closed. That is said almost in terms in *Taylor v. Merchants' Ins. Co.*, *supra*, and clearly implied in the terms of the offer in *Vassar v. Camp*, *supra*. And in the latter case it is declared by the court, that the party making the offer may make it a condition that the proposed contract shall not be obligatory upon him until he receives notice of its acceptance, or unless he receives such notice in a specified time. But where nothing is said, it is the fair implication that one making an offer through the mail expects a reply in the same way; and unless he annexes some express condition to his offer, he must, as a reasonable man, expect to be bound by it, if accepted in the mode indicated by the terms of the offer. Unless this rule of construction were adopted, it would become impossible ever to have a contract closed, as both parties, at all times having the *locus penitentie*, might exercise it upon the receipt of the reply, or before.

And we think in all reason that one who sends an offer by telegraph, asking a reply, is bound, the moment the reply is delivered, by the same communication by which the offer is transmitted. One who sends a proposition by telegraph,

between them shall be by telegraph, this in effect is a warranty by each party that his communications to the other shall be received; and a communication by telegraph is only initiated when it is delivered to the operator; it is completed when it comes to the party for whom it is designed.

§ 548. It is here said, that the rules of law applied to contracts made by correspondence by mail are not applicable to communications by telegraph. But it seems to us that the same rules will in the main apply. For in both cases the party taking the risk of transmission will be the same, and the consequences of mistake or failure will ordinarily fall upon the same party in both modes of communication. But this case seems to hold that there is a distinction between the two modes of communication, in that the post-office, being a public institution, is not the agent of either party, but is alone responsible for the transmission of letters, while the telegraph is the agent of the party employing it. But we do not comprehend the existence of any such distinction. Both are the agents of the party employing them, and such party is responsible for the safe transmission of messages by either. This is well illustrated by the transmission of money by mail. If the debtor assumes to send the amount of his debt by mail, without instructions from his creditor to do so, he assumes the risk of safe delivery, and consequently makes the post-office his agent throughout the transit. But if the creditor directs the money sent by mail, it becomes his agent for the purpose, and the risk is his, and the debt paid the moment the money is placed in the post-office, whether it ever reaches the creditor or not.⁶

and asks a reply, must, in all reason and fairness, expect it will be understood, a reply by telegraph; and if so, it is difficult to perceive any difference between correspondence by mail and by telegraph in effecting a contract.

⁶ The case of *Trevor v. Wood*, *supra*, was reversed by the Court of Appeals, 86 N. Y. 307, and the following propositions declared:—

There must be a concurrence of the minds of the parties upon a distinct prop-

§ 549. Where one employs a special agent, who is not the regular operator, to transmit a message across the wires, he takes the responsibility of correct transmission, whether such would have been the case or not, if he had employed the usual agencies of telegraphic communication.⁷ And where such message had reference to responsibility for the act of another, the sender will be bound to the extent of what his agent transmits, whether he so intended or not. And a message so sent will be the same as if sent by himself, and will be regarded as a memorandum in writing, under the statute of frauds, to the extent of the words sent.

§ 550. The general question of the party assuming the responsibility of the transmission of messages by telegraph position manifested by an overt act. The sending a letter announcing consent to the proposition is a sufficient manifestation of concurrence to consummate the contract. Where the offer is by letter or by telegram, the acceptance signified in the same manner is sufficient, irrespective of the time when it comes to the proposing party.

An agreement to communicate by telegraph creates no warranty by either party that the telegrams shall be duly received.

Proof of the sending a telegram, and of sending by mail a letter accepting the proposition of the defendants, is a sufficient subscription to take the case out of the statute of frauds.

The question, at what particular point a contract by correspondence becomes fixed and immovable, is learnedly discussed by *Marcy, J.*, in the New York Court of Errors, in *Mactier v. Frith*, 6 Wendell, 103, and the proposition declared, that where one sends an offer by mail (and the rule is the same, in correspondence by telegraph), and the other party mails a letter, in conformity with the offer accepting the same, the contract is perfected and immovable, from the time of mailing the letter. And this is now, we think, the settled law upon the point. The Chancellor, in the same case, in the Court of Chancery, held, that the contract was not perfected until the acceptance of the offer was made known to the party making it. But the decree was reversed by the Court of Errors, and the leading opinion delivered by Mr. Justice *Marcy*, reviewing all the learning upon the question, from the Roman civil law, through the continental law-writers and the common law of England, to the present day. The later case of *Brisban v. Boyd*, 4 Paige, 17, adopts the same view, in conformity with the doctrine laid down in the Court of Errors. And the case of *Trevor v. Wood*, *supra*, in the Court of Appeals, decides that the same rule applies to contracts consummated by correspondence, by telegraph. See also *Prosser v. Henderson*, 20 Up. Canada Rep. (Q. B.) 438.

⁷ *Dunning v. Roberts*, 35 Barb. 463.

is illustrated by some of the cases incidentally, in allowing the party to whom the message is sent to maintain an action for damages, on the ground that he had been misled and had thereby suffered loss, where it might have been claimed, that if the party sending the message were bound by it, in the form in which it reached the person to whom it was addressed, he would have been benefited rather than damnified, inasmuch as he would by the error have secured a much larger sale than he would otherwise have done.⁸ But we think the true distinction, in regard to the party entitled to bring the action, where any default in transmitting a message by a telegraph company arises, must rest upon the distinction which everywhere obtains in actions on the case. 1. That the contracting party may maintain the action against the company on the ground of breach of contract, as well as for any breach of duty, as public servants. 2. Those who are injured by their neglect of duty, as public servants offering to serve faithfully all who may have any interest or connection with their operations, may have an action on the ground of a virtual tort in failing to perform this general duty of faithful and careful servants. This seems to us to be well illustrated by the case last cited. The sender of the message might have maintained an action to recover all the damage he sustained by an over order being sent to his correspondent. On the other hand the correspondent was not obliged to forward the two hundred bouquets and collect pay for them of the man who never intended to order them. He was not obliged to accept such man as his debtor, but might recover all his damages, if he so elected, of the party whose default and negligence caused them.

⁸ New York & Washington Printing Telegraph Co. v. Dryburg, 35 Penn. St. 298. In this case the message was for two hand bouquets; the operator not reading the word "hand" correctly, but calling it "hund," added "red," making the order for "two hundred bouquets." The florist procured a large quantity of expensive flowers, which the party giving the order refused to accept, and he brought his action against the telegraph company for the damage, and it was sustained.

§ 551. We must state briefly the points which have been decided in other cases. It was early decided, that where the party sending a message signs a paper handed him by the company at the time, upon which is written or printed a notice that messages of consequence ought to be repeated from the station to which they are addressed, and that a higher rate is charged for repeated messages, and that the company will not be responsible for mistakes in unrepeatd messages; he will be bound by the notice, the limitation being regarded as reasonable, and if not, it is at least such a limitation as the defendants may properly annex to all their undertakings.⁹

§ 552. A similar condition is contained in most of the bills upon which messages are required to be written by those desiring to send them by American telegraph companies. And so far as we know, the courts have in this country followed the English decision already referred to. In the last case cited a query is made how far the company in such case will be responsible for gross neglect. We think there ought to be no doubt in regard to the responsibility of the company in such cases for even ordinary neglect. And the whole extent to which such a condition should be held to qualify the responsibility of the company, is that it will not be held absolutely responsible, as insurer of the accuracy of transmitting messages, unless repeated and paid for as such.

§ 553. This is the only ground upon which such a company could be held responsible as insurers, as this is the only mode in which perfect certainty of accuracy can be secured. And if the sender desires to secure perfect accuracy, he should so state, and pay accordingly, as it seems to us. This construction will reconcile the cases and the conflicting *dicta* in regard to the proposition how far telegraph companies are to be regarded as common carriers.¹⁰

⁹ *M'Andrew v. Electric Telegraph Co.*, 33 Eng. L. & Eq. 180; s. c., 17 C. B. 3.

¹⁰ Thus in the case cited in n. 9 the company are spoken of by *Jervis*, Ch. J.,

§ 554. In a recent case in Pennsylvania,¹¹ where the plaintiff in error was employed by the defendant in error

as "carriers," and therefore entitled to annex any reasonable condition to their responsibility as insurers. And in *Parks v. Alta California Telegraph Co.*, 13 Cal. 422, it is expressly decided that telegraph companies are common carriers. While in *Birney v. New York & Washington Tel. Co.*, 18 Md. 341, the company is held responsible for all reasonable diligence to transmit the message correctly, but is not regarded as a common carrier, but performing a service for others according to its established rules, and that such rules bind him, if known to the employer, or if he has the means of knowing them they form part of the contract and undertaking of the company. But it is here held, that the exception as to the company's responsibility for unrepeatd messages will not excuse the company, where the operator forgot the message and made no effort to transmit it.

And in *N. Y. & Washington Printing Tel. Co. v. Dryburg*, 35 Penn. St. 298, it is also declared, that telegraph companies are not responsible as common carriers and insurers of the correct transmission of their messages, but their responsibility is similar to that of common carriers, and if they negligently or willfully violate their duty of sending the very message ordered to be sent, they are responsible in damages to the party injured. The corporation, it is here said, is liable in *tort* for the misconduct of its agent, although not appointed under the seal of the corporation, if the act be done in the ordinary course of his service or duty. And even when the sender did not pay for repeating the message according to the standing rules of the company duly published, this will afford no excuse for the company where the operator added to the message left an important matter, making it read differently, and, in fact, to be an entirely different message.

These cases, and some others might perhaps be quoted of the same character, sufficiently evince the animus of the rule of law upon the point of the responsibility of telegraph companies.

1. If they annex no conditions to their undertaking, they will be expected to do it in the same careful and faithful manner that other careful and skillful men in that department do such business.

2. If a message is left and paid for as a single transmission, the sender, or those interested in the sending, will be expected to assume what risk necessarily attends such transmissions after diligent and faithful effort to accomplish the duty.

3. As there is but one sure test of the accuracy of messages being sent, that is, by repeating them, one who desires to secure that, or where the business is of such importance as to make that desirable and reasonable, will be expected to so inform the company and pay for the insurance.

4. This rule is so obviously just and reasonable, that we believe it forms a standing and undeviating rule of all the telegraph companies here and elsewhere, and is so notorious, that all persons sending messages may fairly be presumed aware of its existence and will be bound by it.

There are some few early cases not falling precisely within these rules perhaps,

¹¹ U. S. Telegraph Co. v. Wenger, 55 Penn. St. 262.

to send a message to New York for the purchase of stocks, the message being prepaid, and the operator informed at the time that the company would be held responsible for any failure in the transmission, it was held that having failed to transmit the message, they were responsible for the amount lost by the advance in the price before the actual purchase, made upon a later message. In a case of this kind, there would have been the fullest justification, on the part of the company, in requiring pay for repeating the message, as the only means of insuring certainty.

§ 555. In a recent case in Massachusetts,¹² it was held that telegraph companies might limit the measure of their responsibility for errors in the transmission of messages, by reasonable rules and regulations brought home to the knowledge of the other party. And where the blank upon which the message is written contains, as part of the terms upon which messages are received for transmission, a statement, that every important message should be repeated (at half the price of the original charge), in order

but they are not of much weight. In the Court of Common Pleas, Ohio, in the case of *Brown v. Lake Erie Telegraph Co.*, 1 Am. Law. Reg. 685, it was decided at a jury trial, that telegraph companies are responsible for all mistakes or errors in the transmission of messages by them unless from causes beyond their control. This is treating their responsibility as precisely of the same character as that of common carriers, which makes them insurers of the faithful transmission of their messages. If that were so it would justify their taking the only course sure to result in absolute certainty, and repeat every message, and charge accordingly. It seems to us the telegraph companies might, by reversing their rule in regard to repeating messages, secure complete indemnity to themselves, against claims for damages, when their agents conduct with entire fidelity. Thus by repeating every message and charging for the double transmission, unless otherwise ordered, they would know whether the risk of transmission was with them or their employers. And if the message was repeated, at the very moment of transmission, it would by no means cause the same increase of labor or time as the transmission of a distinct message.

The repeating a message does not secure one from errors in reading the original order for the message. But the sender may, by slight extra pains, insure the correct reading of his message, by requiring the operator to read it aloud to him at the time of delivery.

¹² *Ellis v. American Tel. Co.*, 13 Allen, 226.

to secure certainty of accuracy, and that the company would not be responsible for any error in the transmission of an unrepeatd message, beyond the price paid for its transmission, unless a special agreement for insuring the same be made in writing, and an error occurs in transmitting the message, which is also delivered upon a similar blank, and there is no request to have it repeated, the company are not responsible beyond the amount paid for transmission.

§ 556. It seems to be almost universally recognized by the courts, that telegraph companies are not responsible as common carriers, but only according to the nature of their undertaking and the character of the business, and that they may establish any reasonable rules and regulations limiting their responsibility, to their own lines, and to repeated messages,¹³ subject only to the reasonable qualification that no such rules or regulations shall have

¹³ *Western Union Tel. Co. v. Carew*, 15 Mich. 525. This was an action by the defendant in error to recover damages for the incorrect transmission of a message from Detroit to Baltimore over the plaintiffs' lines. It appeared that the message was written on a blank furnished by the company, on which was printed a notice calling attention to certain regulations established by them, printed on the back, and requesting them to send the message subject thereto, containing these, among others: that the company would not be responsible for errors or delay in the transmission of unrepeatd messages; that an additional charge would be made for repeating messages; and that it would assume no responsibility for errors or delay on the part of any other company over whose lines the message might be sent. The plaintiffs' lines extended only to Philadelphia, to which place the message was correctly sent. It also appeared that the defendant had never read these regulations, had never had his attention called to them, and did not in fact know that the message would pass over any other lines on its way to Baltimore. *Held*, that telegraph companies, in the absence of any statute provisions, were not common carriers, and that their liabilities and responsibilities were not to be measured by the same rules, but must be fixed by considerations growing out of the nature of the business in which they are engaged; and that they do not become insurers against errors in the transmission of messages, except so far as, by their rules and regulations or by contract, they choose to assume that position; that in such a case as this the printed blank was a general proposition to all persons of the terms and conditions upon which messages would be sent; and that by writing the message and delivering it to the company the defendant in error accepted the terms and conditions; and that they were reasonable.

the effect to screen the company from the consequences of their own default or misconduct.¹⁴

§ 557. The rule of responsibility of telegraph companies seems to be as correctly laid down in a late case in Kentucky as in any other.¹⁵ It was here held, that one

¹⁴ Mann v. Western Union Tel. Co., 37 Mo. 472.

¹⁵ Camp v. Western Union Telegraph Co., 1 Met. (Ky.) 164. This case is supported by many of the cases before referred to, and by some others more or less directly. Thus in New York, Albany, & Buffalo Tel. Co. v. De Rutte, N. Y. Com. Pleas, 5 Am. Law Reg. (N. S.) 407, s. c. 1 Daley C. P. 547, the same rule is laid down with the qualification, that knowledge of this limitation of responsibility by the company must be brought home to the sender. But this knowledge will be presumed in many cases, as, where the sender signs a bill containing such notice, he will be presumed to have knowledge of its contents, as that was within his power and becomes consequently his duty. So also where such a condition from its innate fitness may be presumed to suggest itself to all persons as the only ground upon which such companies could safely undertake for the perfect accuracy of the transmission of messages, or by which it could be secured by any one it will be the duty of the sender and equally of the receiver to see that his message is or has been repeated, or else to understand that he assumes the necessary hazard in regard to possible inaccuracies in all unrepeatd messages. And where such a practice becomes universal in the business of telegraphing, its notoriety will affect all with presumptive notice; since all men who allow themselves to have anything to do with any general business are bound to inform themselves in regard to those rules affecting the transaction of the business, which, by common consent of all connected with it, are of such reasonableness and necessity as to have become of universal acceptance. And as all persons any way connected with any business are bound to understand its universal or elementary principles, so they will be presumed to do so. This rule of construction is of such universal application, that, in the construction of written contracts, it is always assumed that both parties understand these universal and elementary laws of the business forming the groundwork or subject-matter of the contract, and that they intend to contract with reference to these laws and in subordination to them, unless where the express terms of the contract are in irreconcilable conflict with these laws. In such cases only can it fairly be assumed by courts that the parties intended to contract, in disregard and in defiance of the universal laws of the business.

These principles are somewhat considered, and, as we think, substantially confirmed by the following well-considered case.

A telegraph company furnished to the public printed blanks upon which persons wishing to send messages were to write the same. These blanks contained a printed heading, in which the company stated the conditions upon which it would transmit messages; provided a method was adopted of guarding against errors or delays in the transmission or delivery of messages, by a repetition thereof; and declared that it was agreed by the company and the signer, that without such repetition the liability of the company for such error or delay should be limited to the amount paid for the transmission, unless the message was

who sends a message under the knowledge of the ordinary notice, limiting the responsibility of the company for unrepeatd messages, as already stated, is presumed to assent to its binding obligation, as it is both reasonable and just, and such as the company had the right to prescribe as the price and measure of its responsibility, and that a party acting under it, who does not have his message repeated, will be regarded as sending the same at his own risk, and the company will not be liable for damages resulting from a mistake not occasioned by negligence or want of skill in the agents of the company.

§ 558. In the case of the New York, Albany, and Buffalo Telegraph Company *v.* De Rutte,¹⁵ it was decided, in regard to messages going beyond the line of the first company, that where the first company takes the compen-

specially insured. After the blank date and before the space for the message were these words, "Send the following message subject to the above conditions and agreement." *Held*, That such a printed blank before being filled up was a general proposition to the public of the terms and conditions upon which messages would be sent, and the company become liable in case of error or accident.

That by writing a message under such a heading, and signing and delivering it for transmission, the sender accepted the proposition, and it became an agreement binding upon the company only according to its specified terms and conditions.

And that the legal consequence was not varied by the fact that the sender of the message had not read the printed conditions and agreement there subscribed. That such an omission would be gross negligence, which he would not be allowed to set up to establish a liability against the company which was expressly stipulated against.

Against such a claim the principle of estoppel *in pais* applies in full force.

Telegraph companies are not common carriers. The two kinds of business have but a mere fanciful resemblance and cannot be subjected to the same legal rules and liabilities. But even if they were common carriers, their right to limit their liability by express contract is well settled.

The plaintiffs delivered to the defendant, for transmission from Palmyra to their correspondents in New York, a message directing the purchase of "\$700 in gold," written under such printed blank as above described, and signed by them without ordering the message to be repeated or providing for its being insured. Through the error of some of the defendants' operators the message as delivered to the correspondents required them to purchase \$7000 instead of the smaller sum; in consequence of which error the plaintiff suffered serious loss. *Held*, that they could not recover the amount of the company. *Breese v. United States Tel. Co.*, 45 Barb. 274.

sation for the entire distance, it thereby engages for the due delivery of the message at its destination, unless it expressly limits its responsibility to its own route, or the circumstances are such as clearly to indicate that such was the understanding of the parties. It is here said the telegraph company are not strictly common carriers, but their responsibility is analogous and to be measured by the application of analogous principles, but not always to the same extent. We see no reason why the responsibility of the first company for the entire route may not fairly be measured by the same analogies as that of common carriers of passengers; which will be found sufficiently discussed in another place. There is a well-considered case in Upper Canada bearing upon this point, decided by a divided court, but it would seem that the opinion of the majority of the court followed the analogies applicable to passenger carriers more closely than that of the dissenting judge.¹⁶

¹⁶ Defendants owned a telegraph extending to Buffalo only, but in their printed handbills they advertised their line as "connecting with all the principal cities and towns in Canada and the United States;" and they received the charge for transmission to places beyond their line. The plaintiff had some flour in the hands of N., his agent at N. Y., and about 3 P. M., on the 23d November, delivered to the defendants, at Hamilton, the following message addressed to N., paying the charge to N. Y. : "Am disposed to realize — sell 1,500 barrels." At the time of delivering the message nothing was said as to its importance, or the necessity for immediate despatch, and owing to the defendants' line being out of order, it was not sent till after five on the following afternoon, — being Saturday. The defendants' operator received it at Buffalo, and on the same day delivered it at the office of the American Company, paying their charge. It was not received by the plaintiff's agent in N. Y. until after business hours, on the 26th, and in the mean time the price of flour had fallen materially. The agent therefore, did not sell, but held the flour until the end of December, and as the market had continued to fall, it then realized nearly \$5 a barrel less than could have been obtained on the 23d or 24th. In an action against defendants for negligence in transmitting and delivering the message at N. Y., the jury found for defendants, and on motion for a new trial, Held —

That the verdict must stand, for the only negligence shown was in delivering the message at New York, and if defendants were liable for that they would not be answerable for loss caused by a fall in the market, but under the evidence for nominal damages only.

Per *Robinson, C. J.*, and *McLean, J.* — "Defendants, under the facts proved,

§ 559. There has been considerable discussion in the courts in regard to the proper rule of damages, in case of the default of telegraph companies in sending messages correctly. It has been claimed, that, by reason of the ignorance of the company, in most instances, of the importance of messages sent along their line, there is no properly defined rule of damages, and no measure of the diligence or responsibility of the company, and no standard by which they could properly measure their charges so as to include the proper premium for insurance.¹⁷

§ 560. But we do not apprehend there will really be any difficulty in such companies securing themselves against all reasonable hazard, by the use of suitable caution in assuring themselves at the time of receiving a message that they understand the correct reading of it. For after that it is always in their power to know with absolute certainty whether it is correctly transmitted, by having it repeated back. And as we have before said, if the sender do not choose to be at this expense he will then assume all risk of the transmission, so that in either case all the company really require to render their business entirely safe, is, to be sure they understand the message left with them, which is not attended with any necessary uncertainty.

§ 561. The rule of damages then will be a plain one. The company must make good the loss resulting directly from any default on their part. We see no reason why the ordinary rule should not be applied to cases of this character, as that the party injured by a breach of contract

could not be held liable for delay beyond their own line, but were bound only to transmit the message to Buffalo, and hand it to the American Co. there, paying the charge to New York."

Per *Burns, J.* — "That the defendants were liable as upon an undertaking to transmit the message to New York and deliver it there." *Stevenson v. The Montreal Tel. Co.*, 16 Upper Canada, 530.

¹⁷ Opinion of *Jervis, C. J.*, in *McAndrew v. The Electric Tel. Co.*, 33 Eng. L. & Eq., 180, 185; s. c., 17 C. B. 3.

is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach.¹⁸ It is here said, that it is only uncertain and contingent profits which the law excludes, and not such as, being the immediate and necessary result of the breach of contract, may be fairly supposed to have entered into the contemplation of the parties when they made it, and are capable of being definitely ascertained by reference to established market rates. This same rule of damages has been applied, in the State of New York, to cases of failure to send messages by telegraph companies according to their duty and undertaking.¹⁹

§ 562. We do not apprehend there is any valid objection to the application of this rule of damages to the case of telegraph companies on the ground of the secrecy and reserve with which such correspondence is commonly conducted, and that consequently the companies have not in most cases any sufficient data to form any just appreciation of the extent of the responsibility. The rule is not based so much upon what is supposed to have been the actual expectation of the parties, as what it ought to have been under the circumstances, if their minds had been drawn towards the contingency of a failure in performance. And if one or both the parties choose to enter into the contract, in such ignorance of the facts as not to have been capable at the time of estimating the real extent of the responsibility assumed, that can be no sufficient ground to exonerate him from the full extent of responsibility attaching to the contract. The rule of responsibility is the same for all who freely enter into the same contract, whether fully or correctly informed of the extent of the obligation or not, provided they are not misled by the opposite party.

§ 563. There is one point decided in a somewhat early

¹⁸ *Griffin v. Colver*, 16 N. Y. 489.

¹⁹ *Landsberger v. Magnetic Tel. Co.*, 32 Barb. 530.

case²⁰ upon this subject, which seems to us exceedingly reasonable; that if, when the party sending a message for the purchase of goods, learns that by mistake the amount ordered has been enlarged in the transmission of the message, and in consequence his agent has purchased many times more than he directed, he still retains the whole amount purchased, he cannot recover any loss which accrues beyond what would have been experienced upon an immediate sale; and if he sends the commodity to another market for purposes of speculation, with the intention of taking to himself the profits, if any should arise, and in the event of loss visiting it upon the company, he cannot recover for any loss sustained. For, by adopting the purchase in that mode, he makes the act of the company in transmitting the message enlarged, his own, and he cannot accept the excess purchased both for himself and the company at the same time. He must elect at the time, whether to regard the excess of the order as purchased for himself or the company, and dispose of it accordingly. The points decided in the last case cited will repay repeating here, as they have a very sensible bearing upon questions of damage arising in this class of actions.²¹

²⁰ Washington & New Orleans Tel. Co. v. Hobson, 15 Gratt. 122.

²¹ In an action against a telegraph company for damages sustained by the plaintiffs by the alteration of a message sent on their line, whereby an order to the plaintiffs' factors in Mobile to buy 500 bales of cotton was altered to 2,500, but not charging negligence in the company, an instruction that the defendants are not responsible as common carriers, but only as general agents, for such gross negligence as in law amounts to fraud, is not authorized by the pleadings, and properly refused.

In such case the factors having bought 2078 bales of cotton before the mistake in the message was ascertained, if the company is liable to the plaintiffs for the damages resulting from the alteration of the message, the commissions of the factors upon the purchase of the cotton are a part of the damages for which the company is liable, and the plaintiffs are not bound to accept any offer of the company to pay the damages which excludes these commissions.

In such case if the company is liable to the plaintiffs for damages arising from the alteration of the message, the measure of these damages is what was lost on the sale at Mobile of the excess of the cotton above that ordered, or, if not sold there, what would have been the loss on the sale of the cotton at Mobile in the

§ 564. There are some manuscript cases bearing upon the question of damages in actions against telegraph companies for default in transmitting messages, which it may be well to state.²² In the former of these cases it is said to have been held, that where a merchant in New York ordered a message sent, "Stop sewing pedal braid till I see you," and it was delivered, "Keep sewing," etc., and from the error a large quantity of braid was manufactured into unfashionable shape, which the merchant received and disposed of in the best manner, that he was entitled to recover the whole loss sustained in consequence of the error. And the same rule was adopted in the case secondly cited above.²²

condition and circumstances in which it was when the mistake was ascertained; including in such loss all the proper costs and charges thereon.

When the mistake was ascertained, a part of the cotton was on board a ship to be sent to Liverpool; a part was under a contract of affreightment to the same place, but not on board. The whole should have been sold as it was at Mobile; the plaintiffs having sent it to Liverpool and sold it there, the loss to the company must not be increased by this act of the plaintiffs, but must be based upon an estimate of what it would have sold for, — a part on shipboard and a part under contract of affreightment.

If the plaintiffs sent the cotton to Liverpool for purpose of speculation, with the intention of taking to themselves the profits, if there were any, and in the event of a loss, visiting the loss upon the company, they are not entitled to recover for any loss sustained upon it.

But if the plaintiffs sent the cotton to Liverpool, not with a purpose of taking the profits, if any, but only to indemnify themselves out of the proceeds to the extent of the cost and the obligations incurred by them, they do not thereby lose their right to recover from the company the damages which they would have sustained if the cotton had been sold at Mobile.

The plaintiffs, if they intended to hold the company responsible for the excess of the cotton purchased, should, as soon as they were apprised of the purchase, have notified the company of such intention; should have made a tender of such excess to the company on the condition of its paying the price and all the charges incident to the purchase; and also, that, in case of its refusal to accept said tender and comply with its conditions, they would proceed to sell such excess at Mobile, and after crediting said company with the net profits, would look to it for the difference between the amount of such proceeds and the cost of the excess, including all proper charges. And upon the failure of the company after notice to accede to their offer, they should have proceeded accordingly.

²² Lockwood v. Independent Line of Tel. Co., New York Com. Pleas, Nov.

§ 565. Where the statute imposes a penalty for refusing to send a message across the line of the company, to be received by the person contracting, it was held that, where one directed a message sent by one company to a point beyond their own line, and the first company, at the end of their line, tendered the message to the next company on the line for transmission, which was refused, such person was not the person contracting or offering to contract with the second company; but that the action to recover the penalty should have been in the name of the first company.²³

1865, before Judge *Daly*, a judge of learning and experience, and whose decisions always have weight when authoritatively reported.

There is a case reported in 1 Upper Canada Law Journal (N. S.), 247, as decided in the Common Pleas, New York, by the name of *Rittenhouse v. The Independent Line of Telegraph*; s. c. reported in 1 Daley C. P. 474, where it was said to have been held that a telegraph company is not excused from liability for an erroneous transmission of a message, by the fact that its meaning was unintelligible to the company, so long as the words were plain. It is also here reported to have been held, that, when an order is sent by telegraph for the purchase of one article, and by a blunder of the operator the despatch is made to read as an order for another, the company must make good any difference between the price paid for the article actually ordered, if purchased as soon as the error is discovered, and the price at which it could have been purchased when the despatch was received. But the company is not liable for a loss upon a resale of the article under the erroneous despatch, unless the company has had fair notice of such resale. *Leonard & Burton v. N. Y., Albany, & Buffalo Tel. Co.*, Fifth Dist. Sup. Court.

²³ *Thurn v. Alta Tel. Co.*, 15 Cal. 472. The case is thus stated at length: Where a telegraph company fails to transmit a message upon compliance, by the person contracting with it, with the conditions required by § 154 of the act of 1850 (370), an action for the penalty given by the act lies in favor of such person.

The sum to be recovered is a penalty for the breach of the duty to transmit the message, and the act is, in this section, a penal law, to be strictly construed.

Under the above section the person entitled to recover the penalty is the party who contracts, or offers to contract, for the transmission of the despatch. He may probably do this by his agent or servant, but when the contract is made by a party as agent of another, in order to give a right of action to the principal, the fact of agency must be shown.

Proof as follows: "I am Superintendent of the California State Telegraph Company, and operator in their office at San Francisco. July 2d, Plaintiff came to our office and delivered a message, to be transmitted to Jackson, and paid for transmitting it there. The message was, 'Alta Express Co., Jackson. If you have package for me, forward immediately. Signed, C. Thurn.' In the

§ 566. In England, and in many of the American States, telegraph companies are required to serve all who desire it, on such reasonable terms as shall be prescribed by the company for the regulation of their business, making no discrimination or preference in favor of or against any one. But it was held, that where one contracted with a telegraph company to collect public intelligence and send it over their line exclusively, the company to pay him fifty per cent. of the charge of transmission for collecting it, or in other words, to transmit it for half price; it was held that this was no violation of the English statute, requiring companies to do business for all, "without favor or preference," it being regarded by the court as a legitimate mode of compensating the party for collecting the intelligence, and for bringing custom to the company.²⁴ And it has also been decided, that the statutory prohibition against disclosing the secrets of the office or communicating messages, does not extend to a disclosure as a witness in a court of justice.²⁵ The wonder is that any one should ever have supposed that such a disclosure could incur a penalty under the statute.

§ 567. There are some few other points, of rather a mis-

margin of the message sent were the words 'F. July 2nd.' Few words passed when the message was delivered; no express agreement that the Cal. State Telegraph Company should forward the message to Sacramento, and employ the Alta California Telegraph Company to transmit it from there to Jackson. He must have known that we could not send it to Jackson, as we had no line there. I think there was something said about sending it by the defendants' line from Sacramento." C. Thurn, the plaintiff, sues the Alta Cal. Telegraph Co. for the penalty under the 154th section of the act of 1850 (370). *Held*, that under these facts he is not the person making or offering to make the contract, within the meaning of the act, and cannot recover; that the only contract proven is a contract by the State Telegraph Company to send the message or have it sent; and a contract on its part to contract on its own account with the Alta Telegraph Co., to send the message.

If the message in this case had not been transmitted, plaintiff might have held the State Telegraph Co. responsible. *Thurn v. Alta Telegraph Co.*, 15 Cal. 472.

²⁴ *Reuter v. Electric Tel. Co.*, 6 Ellis & Bl. 341.

²⁵ *Henisler v. Freedman*, 2 Parsons, 274.

cellaneous character, which have been decided in regard to the rights, duties, and liabilities of telegraph companies, which we shall state very briefly. 1. We have in our work on Railways noticed some cases bearing upon the relative rights, pertaining to highways and telegraph companies, under the subject of Eminent Domain and Highways. It seems to be settled in England, that placing telegraph posts in the highway without legislative authority, will be ordinarily treated as a nuisance, unless placed in some position inaccessible to ordinary travellers, even when not placed in the travelled or central portion of the highway.²⁶ So, also, when a telegraph company without any parliamentary powers laid down their wires in tubes under a highway, an information and bill was filed, complaining of this as a nuisance to the public, and an invasion of the rights of the adjacent land-owner. But the court refused to grant an injunction until the rights of the parties had been established at law.²⁷ 2. And where telegraph companies are allowed by legislative grant to lay down their lines along a highway, they are still bound to see that no injury happens to passers along the highway, from the defective or imperfect condition of the instruments used by them, whether posts or wires.²⁸ It was here decided, that in such cases the company will be responsible for damages to an individual, caused by the erection of the telegraph along the highway, if improperly made, or if suffered to fall down and be out of repair, although the travelled part of the way is not thereby obstructed. In this case the plaintiff was a passenger upon a stage-coach, which was upset by coming in contact with the wires of the company, in consequence of the decay and swaying over of

²⁶ *Reg. v. United Kingdom Electric Telegraph Co.*, 9 Cox, C. C. 174; s. c., 6 L. T. (N. S.) 378; s. c., 31 L. J. (N. S.) Magistrates Cases; *ante*, § 109.

²⁷ *Attorney-General v. United Kingdom Electric Telegraph Co.*, 30 Beav. 287; s. c., 8 Jur. (N. S.) 583.

²⁸ *Dickey v. Maine Tel. Co.*, 46 Me. 483; s. c., 8 Am. Law Reg. 358.

the posts and the lowering of the wires thereby, although not across the travelled part of the highway. 3. In one case²⁹ the plaintiffs were the owners of a telegraph cable lying at the bottom of the sea between England and France. The defendants were aliens, and their ships, while sailing upon the high seas, more than three miles from the English coast, lowered an anchor and injured the cable. It was held that the court would presume that the masters of the ship knew of the existence and situation of submarine cables, and that a duty was thereby cast upon all masters of ships to manage their vessels so carefully and skillfully as to avoid (if possible, by the exercise of reasonable precaution) injuring these cables. 4. The extent of the duty of maintaining secrecy among the operatives and employees of the telegraph companies whose employment brings them acquainted with the contents of messages sent or received, is of great importance. This is in many of the States secured by the imposition of penalties for disclosure. But we apprehend that no security will be available in any such sense as to render this mode of communication safe and comfortable, unless it be either the religious sense of duty, or at the least a sense of moral honesty and honor, which should lead one to speak the truth and to keep the truth, when that becomes a duty.³⁰ There can be no question of the duty of the most inviolable secrecy in regard to all messages sent or received by telegraph companies. And unless this can be secured it will very essentially abridge the extent of their business.

²⁹ *Submarine Tel. Co. v. Dickson*, 15 C. B. (N. S.) 750; s. c., 10 Jur. (N. S.) 211.

³⁰ It has been observed of late that women are more generally employed in telegraph offices than formerly, and especially on the other side of the Atlantic. This has been attributed to the higher sense of truth and honor among that sex than the other. The same thing leads many to employ women as cashiers in places where it is impossible to place any check upon them. The same reason has been assigned for employing women in highly responsible places in the Treasury department since the manufacture of so much of the currency of the country there. This is not the place to discuss questions of that character.

There is a duty in all employments to keep the secrets of the business, but more especially in one where such extensive correspondence is conducted.³¹ 5. There is one decision in regard to these companies by the Supreme Court of Nova Scotia,³² which has more bearing upon the question of currency than any other. By the terms of the lease of the plaintiffs' line to the defendants, payments are to be made for rent in "dollars and cents of United States currency." A question arose whether the treasury notes, made lawful money in the United States by subsequent act of Congress, could be regarded as coming fairly within the terms of the lease, the value of the United States currency being thereby greatly depreciated. The court held that notes were not a legal tender on the lease for rent. This decision unquestionably meets the equity and justice of the case, but whether it meets the law is, perhaps, more questionable. We have come to regard that act as entirely within the constitutional powers of Congress, although a most awful experiment to visit upon a commercial country like our own, and one which foreign courts would look upon as altogether inadmissible under the circumstances in which it was adopted. But if its adoption was doubtful, its continuance seems more so, after the emergency which called it into existence has passed away. 6. Where a telegraph company has obtained permission to establish their posts through any town or city, by decision of the municipal authority, and such posts are thus established within the limits of the highway, this settles, conclusively, the rightfulness of their

³¹ In *Tipping v. Clark*, 2 Hare, 393, *Wigram*, Vice-Chancellor, said, that every clerk employed in a merchant's counting-house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk. See also Prof. Dwight's excellent article on the law of this subject. 4 Am. Law Reg. 193, 206, and cases cited on this point. We desire here to make our acknowledgments for great assistance from that article in preparing our own chapters on the topic.

³² *The Nova Scotia Tel. Co. v. Am. Tel. Co.*, 4 Am. Law Reg. (N. S.) 365.

erection, so that they cannot subsequently be removed by such municipal authority, or treated as a public nuisance.³³

7. In one case it seems to have been considered by the judge, that telegraph companies could not be held responsible beyond the amount paid, for any defect in transmitting a message, because the operation was liable to be affected by atmospheric influences; and also because the message was so expressed as to be unintelligible to the operator, and he could not be supposed to comprehend its value.³⁴ This latter might possibly be some excuse for not holding the company responsible for any large sum beyond the cost of the message. But it is generally expected that a message of a commercial character is of more value than its cost or it would not be sent. And we know of no other case where atmospheric influences are considered as relieving these companies from responsibility for not correctly transmitting messages. 8. The rule of admitting telegrams purporting to be in reply to those sent, that they must have been authorized by the parties whose names they bear, is naturally somewhat liberal.³⁵ But telegrams sent by the wife of a co-defendant are not evidence against any of the defendants.³⁶ 9. Morse's patent is vindicated and its infringement declared, in a very elaborate case in the United States Supreme Court.³⁷

§ 568. There is one case,³⁸ which seems to cover a large

³³ *Commonwealth v. Boston*, 97 Mass. 555.

³⁴ *Shields v. Western Tel. Co.*, 9 Western Law J. 283. See also *Kinghorn v. Mont. Tel. Co.*, 18 Up. Canada (Q. B.) 60, as to special damages not being recoverable in ordinary cases of this character. In *Law v. Montreal Tel. Co.*, 7 Up. Can. C. P. 23, where the plaintiff sent his ship to take a cargo of wheat between two points, supposing he could have 8,000 bushels by mistake of the company, instead of 3,000, the actual number, he was held entitled to recover the expense of sending his ship and returning, but not the loss by taking a freight of 3,000 instead of 8,000 bushels.

³⁵ *Taylor v. Steamboat Robert Campbell*, 20 Mo. 254.

³⁶ *Benford v. Sanner*, 40 Penn. St. 9.

³⁷ *O'Reilly v. Morse*, 15 How. (U. S.) 62.

³⁸ *De Rutte v. New York Tel. Co.*, 1 Daly (C. P.), 547. The contract for the transmission of a telegraphic message is not necessarily made with the

portion of the questions which have arisen upon this subject. The high character of the court, although one of

person by whom it is sent. If the person to whom it is addressed is the one interested in its correct and diligent transmission, and by whom the expense of sending it is borne, he will be regarded as the person with whom the contract is made.

The business of telegraph companies, like that of common carriers, is in the nature of a public employment, as they hold out to the public that they are ready and willing, upon payment of their charges, to transmit intelligence for any one, and not for particular persons only.

Common carriers are held to the responsibility of insurers for the safe delivery of property intrusted to their care, upon grounds of public policy, to prevent fraud and collusion with thieves, and because the owner, having surrendered up the possession of his property, is generally unable to show how or where the loss or injury occurred.

These reasons do not apply to telegraph companies, and they are not held to the responsibility of insurers for the correct transmission and delivery of intelligence. As the value of their service, however, consists in the message being correctly and diligently transmitted, they necessarily engage to do so, and if there is an unreasonable delay, or an error committed, it is presumed to have originated from their negligence, unless they show that it occurred from causes for which they are not answerable.

They may qualify their liability to the effect that they will not be answerable for errors unless a message is repeated, but this condition must be brought home to the knowledge of the person who brings the message for transmission.

Where a telegraph company is paid the whole compensation for the transmission of a message to a place beyond their own lines, with which they are in communication by the agency of other companies, they will be regarded as engaging that the message will be transmitted to, and delivered at that place, unless there is an express stipulation to the contrary, or the circumstances are such as to show that the understanding of the contracting parties was otherwise.

Where a merchant in San Francisco receives a telegraphic message from New York, which leads him into a purchase involving inevitable pecuniary loss such as would not have occurred but for an error in the transmission of the message, he is not compelled to seek through an extensive chain of telegraphic communication to ascertain where the error was made, but the company to which the message was originally delivered and to which the whole compensation for its price was paid, is liable. Having peculiar facilities, the obligation is then upon this company to ascertain where and how the error occurred, and to fix the ultimate responsibility where it belongs.

The defendants' line of telegraph extended from New York to Buffalo, where it connected with other lines and a pony express to San Francisco. The defendants received the entire compensation for sending a message to San Francisco, which was correctly sent by their own line and the connecting lines as far as St. Louis, but an important mistake occurred between that point and San Francisco. *Held*, as nothing was said about defendants being responsible for correct transmission over their own lines, as they received the whole amount that was asked to

subordinate jurisdiction, and the very satisfactory manner in which the question was disposed of, seem to justify its insertion here, at length, so far as the head notes extend.

send it to San Francisco, without communicating by what lines it would be sent, or any other particulars as to the mode or manner of its transmission, that they took upon themselves the whole charge of sending it, and were answerable for the error.

Independent of any question of contract, if a person is put to loss and damage through the negligence of a telegraph company, in transmitting to him an erroneous despatch, the company would be liable to him in an action for negligence; and if they received the whole compensation for sending it, they would be liable in such an action, though the error was made by one of the companies through whom they transmitted it.

The plaintiff's agent in Bordeaux obtained from a commercial house in that city an order for the plaintiff, a commission merchant in San Francisco, to purchase for them and ship from San Francisco, a cargo of wheat, at a certain price. The plaintiff's agent prepared a telegram in these words: "Edward De Rutte, San Francisco. Buy for Callarden & Labourdette, bankers, a ship-load of five to six hundred tons white wheat, first quality, extreme limit 22 francs the hectolitre, landed at Bordeaux; same conditions as the Monod contract. Th. De Rutte," — which the plaintiff's agent sent in a letter to a commercial house in New York, with instructions to send it to the plaintiff at San Francisco in the quickest manner, and to charge the expense to the plaintiff. The house in New York sent it by their clerk to the defendants' office, who paid to the defendants the entire compensation for its transmission by telegraph to San Francisco. When delivered to the plaintiff in San Francisco, several errors had been made in its transmission, the most important of which was a change from 22 to 25 francs the hectolitre. The plaintiff was not misled as to the other errors, and knew what was meant; but the words "25" he assumed to be correct. Grain could be purchased at that time in San Francisco at from 24 to 25 francs the hectolitre, and he accordingly chartered a vessel and purchased a cargo. But before the vessel sailed, he received, via New York, the letter which his agent had sent, when discovering the mistake, he resold the wheat, and got rid of the charter-party, incurring by the transaction a loss of over \$2,000, for which he sued the defendant and recovered.

Held, that the defendants' contract for the transmission of the message was with the house in Bordeaux, not with the house in New York, and the action was properly brought in his name.

That it was not an act of coöperating negligence for him to act upon the dispatch, without having it repeated, after he had discovered three errors in it. That they were not of such a nature as should have led him to treat the whole dispatch as unreliable, and that he was justified in assuming that the word "25" had been correctly transmitted.

That as the error in the dispatch was the cause of his purchasing the wheat at the price which he did, and as the inevitable loss which occurred was the direct and immediate consequence of the error, that the loss he sustained was the proper measure of damages.

§ 569. Where a telegraphic company is established from one point to another, having secured the exclusive right of using its mode of operation, a court of equity cannot restrain another company from dividing the business between those two points by means of transmitting messages by a circuitous route, by another mode of operating which does not infringe the patent of the first company.³⁹

§ 570. The law requires messages to be transmitted in the order in which they are received, promptly and faithfully. And where a party left a message: "Come by the night train," and paid the price of its transmission, and was assured it would be done at once, and it was delayed till the next morning, when it was of no importance, he was held entitled to recover the penalty of \$100, under the Indiana statute for voluntary neglect of duty by telegraph companies, unless the delay were caused by the exception in the statute in favor of communications for and from officers of justice.⁴⁰

§ 571. In another case the following points were determined. A clause in the printed regulations of a telegraph company, that they will not be responsible for mistake or delay in the transmission of a message, applies only to the transmission of the message and not to mistakes or delay in its delivery after it has been correctly transmitted. The plaintiff sent a message to the defendant's office in New York, directed to an attorney in Providence, R. I., directing him to attach a house and lot in the latter city, of one B., who was then temporarily absent from Rhode Island, for a debt of \$12,000 due from B's firm to the plaintiff. The message was brought to defendants' office at half-past eight, P. M., the office being then closed for the transaction of ordinary business. Their agent was told that the message was

³⁹ *Western Telegraph Company v. The Magnetic Telegraph Co.*, 21 How. (U. S.) 456; *Same v. Penniman*, id. 460.

⁴⁰ *Western Union Telegraph Co. v. Ward*, 23 Ind. 377.

important; that unless it was sent and delivered at once, it would be of no use; that the object of the message was to get an attachment upon property in Providence; that unless it was made before the Stonington train reached the Rhode Island state line, it would do no good. The defendants' clerk answered the plaintiff's messenger, that the message would be sent and delivered as requested, and that he would not take the money if he thought there was any doubt about it. The message was sent at ten minutes past nine, with directions from the operator in New York to send it in haste, and was received by the operator in Providence at half-past nine P. M., who was then engaged in receiving reports for the press, which by statute have precedence over all other matters. The Providence operator answered, that it could not be sent that night, as the delivery boy had gone home, to which the other answered, that it must be, and the former replied by a sign expressing his concurrence. The Providence operator was engaged without cessation in receiving newspaper reports until half-past eleven o'clock P. M., when he had the message copied and sent to the attorney. When the attorney received it, it was too late to have the attachment made, before the arrival of B., who returned to Rhode Island in the Stonington train that morning, and the plaintiffs lost the advantage of securing their debt by an attachment upon B.'s house and lot, which was worth over \$12,000. B.'s firm afterwards went into bankruptcy, and all that the plaintiffs recovered upon their debt from the bankrupt estate was \$500. Held, that the plaintiffs were not bound to exhaust their legal remedy against their debtors by the recovery of a judgment and the issuing of an execution before bringing an action against the telegraph company for their damages; that the measure of the damages was the amount of the debt and interest from the day of the

delivery of the message, less the five hundred dollars received from the bankrupt estate of B.'s firm. The measure of damages should not be confined to the cost of sending the message and expenses incidental thereto.⁴¹

⁴¹ *Bryant v. Am. Tel. Co.*, 1 Daly (C. P.) 575.

CHAPTER II.

RIGHTS OF TELEGRAPH COMPANIES.

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| <p>§ 572. Right to "pass directly across a railway," does not justify boring under it.</p> <p>§ 573. Exposition of the terms "under" and "across."</p> | <p>§ 574. Erecting posts in highway without legislative authority a nuisance, even if sufficient space remain for the passage of travel.</p> <p>n. 4. Opinion of Crompton, J.</p> |
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§ 572. WHERE a telegraph company had by their act the power to pass under highways, but to pass "directly but not otherwise across any railway or canal," and a railway was laid upon the level of a highway, in accordance with their special act, it was held that the telegraph company could carry their works under the highway at the point where it was intersected by the railway.¹ But the telegraph company, attempting to pass under the railway in such a manner as to disturb their works, was held liable in trespass.²

§ 573. *Parke, B.*, in giving judgment, said: "Across seems therefore different from under, and the power to carry "across" does not enable them to go under. It may be that this prohibition would not apply, if the railway were carried over a highway, at a great height, for then the highway and railway might be considered independent of each other."

§ 574. In a recent English case³ it was decided, that a

¹ *Southeastern Railw. v. European & Am. Tel. Co.*, 9 Exch. 363; s. c., 24 Eng. L. & Eq. 513.

² *Redf. Railw.*, §§ 130, 143, 164.

³ *Reg. v. United Kingdom Electric Telegraph Company*, 9 Cox, C. C. 174; 3 F. & F. 73; 8 Jur. (N. S.) 1153.

telegraph company which erected posts in any portion of the highway although not in the travelled portion of it, whereby the way is rendered in any respect less commodious to the public than before, is guilty of committing a nuisance at common law; and the fact that the jury find that a sufficient space for the public use remained unobstructed, will not afford any justification, unless the act is done by legislative permission.⁴

⁴ The case is of so much importance that we have ventured to insert the leading opinion on the final hearing in full bench. *Crompton, J.*: "The defendants were indicted for erecting their post on a high road, so as to obstruct the public in the use thereof, and we determined, before giving judgment, to hear the case of *Regina v. Train*, thinking it possible that the same question might there arise, or that something, at all events, throwing light upon it might be elicited during its progress. Having heard that case, there is nothing to prevent our giving judgment without further delay. My brother *Martin* laid down two propositions, and the question is, whether either of them constitutes a misdirection. The first of these propositions was as follows: 'In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences, one on each side, the right of passage or way *primâ facie*, and unless there be evidence to the contrary, extends to the whole space between the fences; and the public are entitled to the use of the entire of it as the highway, and are not confined to the part which may be metaled or kept in order for the more convenient use of carriages and foot passengers.' Now, this seems to us a very proper direction. It is urged by Mr. O'Malley that this ruling is not applicable to a place where there is a considerable portion of green sward on either side of the metalled road, which either the owner of the adjoining freehold or the lord of the manor would be entitled, if he thought proper, to enclose. This is first of two objections taken on behalf of the defendants. But it seems to me that my brother *Martin* carefully guards against that. He says, that *primâ facie* the space between the fences is to be taken as the highway; and this seems to be in accordance with the judgment of Lord *Tenterden*, C. J., in *Rex v. Wright*, 3 B. & Ad. 681, where he says: 'I am strongly of opinion, when I see a space of fifty or sixty feet through which a road passes, between enclosures set out under an act of Parliament, that, unless the contrary be shown, the public are entitled to the whole of that space, though, perhaps, from economy, the whole may never have been kept in repair.' The same principle is involved in the decision of *Williams v. Wilcox*, and my brother *Martin* seems to have laid down the law in unison with these cases. He says, 'that *primâ facie*, and in absence of evidence to the contrary, the public are entitled to the right of passage over the whole, and are not confined to that part which is metalled for the better convenience of travellers and traffic.' Mr. O'Malley was unable, when invited, to say to what definite portion of the road, metalled or otherwise, he held the public to be entitled. He, however, contended that the posts might have been erected on what was in fact no part of the highway, such

as a rock, or something of that kind, which might occupy part of the space between the fences, but over or across which no road could possibly exist. But would not be a part of the highway any more than a house similarly placed, built before the dedication of the road. We think, therefore, on the first point, the direction of the learned judge was correct, and that the right of the public extends over the entire highway.

“The second proposition laid down by the learned judge is a wider one, and it remains to be seen whether it amounts to a misdirection. It is ‘that a permanent obstruction erected on a highway, placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act, and a public nuisance at common law; and that if the jury believed that the defendants placed, for the purposes of profit to themselves, posts, with the object and intention of keeping them permanently there, in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such size and dimensions and solidity as to obstruct and prevent the passage of carriages, and horses, or foot passengers upon the parts of the highway where they stood, the jury ought to find the defendants guilty upon this indictment; and that the circumstance that the posts were not placed upon the hard or metalled part of the highway, or upon a foot-path artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right, and do not affect the right of the crown to the verdict.’ This appears to us also to be substantially a proper direction, inasmuch as the real question is, whether there was a practical, as distinguished by myself in *Regina v. Russell*, from a mathematical nuisance. My brother *Martin* appears distinctly to have raised that point, by saying that the posts must be of such size, dimensions, and solidity as to obstruct and prevent the passage of carriages and horses and foot passengers at all. In *Regina v. Russell*, the jury found there was no practical obstruction; but where there is a practical obstruction on a highway by which the public are prevented from using it, that is a nuisance according to all definitions of the word, and it makes no difference whether or not enough be still left unobstructed for the use of the public; or whether the obstruction is placed on that part of the road which is neither metalled nor repaired for the purpose of traffic. In *Rex v. Wright*, Lord *Tenterden* laid it down that the public are entitled to the entire space on either side of the highway, as he says, for the benefit of air and sun. We must take it now that the jury found the defendants guilty upon these facts, and that the posts were of such size and solidity as to create an obstruction, and amount to a nuisance. It was further objected by Mr. O’Malley that certain of the posts appeared actually to have stood upon parts of the road which were inaccessible to travellers; but supposing this to be the case, it would be no use to the company to have these few isolated posts left standing at different spots along the line of road; and if they wished to keep them, they should have contended at the trial that some of these posts did not come within the rule laid down by the learned judge. We think, therefore, that with respect to these few posts, which may possibly have excepted from the rule, it would be useless to grant a rule.”

PART V.



THE LAW OF COMMON INNKEEPERS AND KEEPERS
OF STABLES IN CONNECTION WITH INNS.



PART V.

THE LAW OF COMMON INNKEEPERS, AND KEEPERS OF STABLES IN CONNECTION WITH INNS.



CHAPTER I.

INTRODUCTION.

As these two classes of persons, Innkeepers and Stable-keepers, have, by the Roman Civil Law,¹ been included

¹ Story on Bailm. § 464; 1 Bell, Comm., 465-476; 2 Kent, Comm., 592, Dig. 4, 9.

Innkeepers and stable-keepers were, by the edict of the Roman Prætor, included with shipmasters, coachmen, or common carriers, and subjected to the same severe responsibility. Domat, part i., book i., tit. xvi. sec. 1, nos. 1172-1183, and citations from Civil Law. We here insert the general statement of the provisions of the Roman Civil Law upon this subject. It will hereafter appear how precisely the rules of the Common Law conform to those of the Civil Law.

The Law of Innkeepers, according to the rules of the Roman Civil Law. 1 Domat, 481-483, nos. 1172-1178.

Engagements of Innkeepers. — There is formed between the innkeeper and traveller an agreement, by which the innkeeper obliges himself to the traveller to lodge him, and to take care of his baggage, horses, and other equipage (lib. 1, D.) and the traveller on his part binds himself to pay his charges.

A Covenant either Express or Tacit with the Innkeeper. — This engagement is formed usually without any express covenant, by the traveller's bare entering into the inn, and his depositing his baggage and other things into the hands of the master of the inn, or of those whom he appoints to take care of it. (lib. 1, § 3, D.)

In what Manner the Innkeeper is made accountable for the things by the Act of Domestics. — The innkeeper is accountable for the acts of those of his family and of his domestics, according to the functions in which they are employed. Thus, when a traveller gives to the servants, who have the keys of the chambers, a cloak bag, or other things, or when he puts his horse into the stable, under the care of the hostler, the master of the inn is answerable for them. But if the

among those to whom a peculiar responsibility attaches, and the same general principle has extended itself throughout Europe and America, it seemed not improper that the topic should be embraced in the same volume with the discussion of the law attaching to other classes of persons to whom the same, or a similar degree, of responsibility has been extended by our own law.

It will not now be of much interest to discuss the grounds upon which this extraordinary degree of responsibility rests. It was said, primarily,² to have rested upon

traveller upon his arrival delivers a bag of money to a child, a scullion, out of the master's and mistress's sight, the innkeeper will not be answerable for a bag of this consequence deposited in such a manner. (Lib. 1, § ult. D.)

"Care of the Innkeeper." — The master of the inn is obliged to watch, or cause to be watched by others, with all possible care, all the things which the traveller brings and deposits in the inn, whether it be in the presence or absence of the master. Thus, he is answerable, not only for his own faults, but even for the least neglect, either in himself or servants; and he is only discharged from what may happen by such accidents as the greatest care could not have prevented. (Lib. 3, § 1, D.)

"Innkeepers answerable for Thefts." — Although innkeepers are not paid in particular for watching or keeping what is deposited in the inn, but only for the lodging, and for other things which they furnish to travellers, yet they are, nevertheless, bound to take the same care as if they were expressly paid for watching the goods. For this is an accessory to the commerce which they drive; and it is for the interest of the public, considering the necessity under which travellers are to trust innkeepers, that they be bound to an exact and faithful care of the things committed to their custody; and that they be made answerable even for thefts. For otherwise they might with impunity commit the thefts themselves. (Lib. 1, § 1, D.)

"They are accountable for the Acts of any of their Family or Domestics." — If any one of the domestics, or of the family of the innkeeper, causes any loss to a traveller, as if he steals from him even that which was not specially intrusted with any of the people of the inn, or if he damages his goods, the master of the inn shall be accountable for the value of the thing lost, or of the damage done. (Lib. 1, D.)

"They answer for their Servants only for what they do in the Inn." — The engagement of the innkeeper, for the act of his domestics, is limited to what is done in the inn, and if any of his servants steals anything, or does any damage in another place, the master is not accountable for it. (Lib. ult. D.)

The foregoing rules correspond very nearly with those which we shall find established in the English Common Law.

² Dig., lib. 4, tit. 9, l. 1, § 8; Story on Bailm., §§ 464, 465, *et seq.*

the fact of extraordinary confidence being reposed, and the consequent extraordinary temptation existing to fraud, or plunder, or combination with others for these purposes. These considerations have become, to some extent, obsolete. It is true, however, even at the present day, that the large amount of travel, among almost every class of our citizens, renders us more dependent upon the faithfulness, honesty, and fairness of conduct of innkeepers, in their treatment of us, and our property confided to them, than upon almost any other class of persons which we are brought in contact with, in the ordinary course of daily life.

There is one evil and temptation, among this class of persons, which no legal treatise, and no legislation, could be expected to remedy, that is, the temptation to exorbitant demands upon their guests, by way of pecuniary compensation. This is something inherent in the nature of the business — the transitory nature of the customers, and the large number of persons among whom the impositions, or what has sometimes not inappropriately been called, the extortions, are divided. And there is another cause for the indefinite extension and increase of this evil, especially in our own country, for which innkeepers are not responsible: the reluctance and shamefacedness, everywhere experienced, at the thought of making any question or inquiry in regard to the entire justice and reasonableness of an innkeeper's bill. This may be the result of a false public sentiment, created, to some extent, by the innkeepers themselves. But it is fair to say, that there is no other country in the world, where people submit with such apparent good will, to exorbitant exactions of that character; and until we can summon fortitude sufficient to express our dissatisfaction with such treatment, at the time it occurs, we need not very strenuously or loudly complain of its continuance, and we can recommend no other remedy for any violations of legal duty of this

character by innkeepers ; to recommend an action at law being but an accumulation of the injury.

But beyond and independent of this great and crying evil, in our country, there are other considerations which are important to the security and independence, both of the traveller, and of the innkeeper as well, which depend upon clearly defined legal rights and duties, upon the part of the host and the guest respectively, which it is essential to both to know and understand in all their details, which it will be the purpose of this brief treatise to aid in accomplishing.

We shall not occupy any unnecessary space in historical or antiquarian detail, either in regard to the institution, or the law of innkeepers, before the final establishment of their rights and duties in the common law of England, as that is the foundation of all our present law upon the subject. And all that the profession, or the public, now require in a law-book, is the precise state of the law, in our own country, at the present moment.

CHAPTER II.

WHO ARE TO BE REGARDED AS COMMON INNKEEPERS AND STABLE-KEEPERS, IN CONNECTION THEREWITH.

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| <p>§ 575. <i>The definition of a common inn or house of public entertainment.</i></p> <p>§ 576. <i>It is not requisite that stables be connected with the house. Or that travellers exclusively receive entertainment there.</i></p> <p>§ 577. <i>It will not vary the character of the relation that one remains ever so long, or that the terms of compensation are fixed by previous contract.</i></p> <p>§ 578. <i>The same points further illustrated.</i></p> <p>§ 579. <i>But a mere boarding-house keeper cannot be subjected to the responsibilities of an innkeeper.</i></p> | <p>§ 580. <i>So if a guest take a room at an inn, for the purpose of selling goods therein, the landlord is presumptively not responsible for their safety.</i></p> <p>§ 581. <i>Inns and taverns seem now to be much the same.</i></p> <p>§ 582. <i>Inns, where spirits were furnished, have in this country, been generally under statutory regulation.</i></p> <p>§ 583. <i>The extent of statutory regulations upon the subject.</i></p> <p>§ 584. <i>Summary of the definition of an innkeeper.</i></p> |
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§ 575. It seems to be settled, since the case of Cayle,¹ that to constitute one an innkeeper, within the legal force of that term, he must keep a house of entertainment, or lodging, for all travellers or wayfarers, who might choose to accept the same, being of good character or conduct. "It ought to be a common inne," for passengers, not for neighbors or boarders.¹ One taking lodgers, to lodge and diet in his house, and letting stables for their horses, is not an innkeeper.² But a house of public entertainment in London, where beds and provisions are furnished for all persons paying for the same, but which was merely called a tavern, or coffee-house, and was not frequented by stage-coaches and wagons from the country, and which had no

¹ 8 Co. 32.

² Parkhurst v. Foster, 1 Salk. 387; s. c., 1 Ld. Ray. 479.

stables connected with, or belonging to it, is to be considered an inn, and the owner is subject to all the responsibilities of innkeepers, and has a lien on the goods of his guests for the payment of his bill, and that even where the guest did not appear to have been a traveller, but one who had then recently resided in furnished lodgings in London.³

§ 576. It seems, therefore, that the old idea of an inn, that there must have been a stable connected with it, is now qualified, to the extent, that no such appendage is, in any sense, essential to the definition. For if that were so, at the present day, when so few persons travel by their own conveyances, most of our large hotels in the cities, and many in the country villages, would lose the character of common inns, or houses of public entertainment. So too it will not

³ *Thompson v. Lacy*, 3 B. & Ald. 283. The language of *Bayley, J.* in this case seems very pertinent to the definition of this class of persons. The learned judge here says: "I am of opinion that this is substantially an inn. In order to learn its character, we must look to the use to which it is applied, and not merely to the name by which it is designated. Now this house was used for the purpose of giving accommodation to travellers, who, in *London*, reside either in lodgings or inns. The defendant did not merely furnish tea and coffee, as the keeper of a coffee-house does, nor a table, as the keeper of a tavern does; but provided lodgings, and that in the way they are provided at inns, for the charge was at so much per night. In the *Six Carpenters'* case, 8 Coke, 290, a tavern is so far considered as an inn, that all persons are said to have a right to enter it. And I take the true definition of an inn to be, a house where the traveller is furnished with everything which he has occasion for whilst upon his way. It has been said, however, that in *London* the character of inn belongs only to those houses of public entertainment frequented by wagons and stage-coaches. Now if the liability of a party as innkeeper depended on such a circumstance, it would follow that a person coming to such a house as this from the country in his own private carriage, or in a postchaise, could not be entitled to consider the owner as responsible for the safety of his goods. It has also been urged, that to constitute an inn there should be stables annexed; if that were so, many inferior houses of entertainment in the country, frequented by foot travellers, would not come within the description; and the poorer travellers would not have the protection which the law gives to a guest against an innkeeper. I think, therefore, that in point of law this is an inn, and that the defendant is under the obligation to which innkeepers are liable, namely, that he is bound to receive all persons who are capable of paying a reasonable compensation for the accommodation provided, and that he is liable for their goods, lost or stolen; and, on the other hand, that he has a lien on the goods of his guests for the payment of his bill. This rule must, therefore, be discharged."

be indispensable to give that character to the house, that the inmates received there should be exclusively transient guests or travellers. If all of this latter character, who come, are received and cared for, according to their requests, it will not affect the character of the house, as a common inn, or public house, that mere permanent boarders, for longer or shorter periods, are also received, upon rates previously stipulated.³

§ 577. And if one remains for ever so long a period at a public house, under the general condition of paying the terms of a transient lodger, he will be regarded as a guest at a public inn, with all the rights and duties resulting from the relation, both on the part of the host and the guest, so long as he continues in that way.

§ 578. But, as before intimated,⁴ the keeper of a mere coffee-house or private boarding or lodging-house, is not an innkeeper in the legal sense of that term.⁵ And a similar rule has been adopted in this country. In *Wittermute v. Clark*,⁶ *Oakley*, Ch. J. said, "To charge one as innkeeper, it is sufficient to prove that all who came were received as guests, without any previous agreement as to the length of their stay, or the terms of their entertainment." . . . "A public house of entertainment for all who choose to visit it, is the true definition of an inn." And in another case⁷ it is said, that a hotel in a city which receives transient guests, is a common inn. And it has been held that a traveller who stops at an inn does not cease to become a guest and become a boarder, by an agreement to pay by the week.⁸ The learned judge, Mr.

⁴ *Ante*, n. 2; *Packer v. Flint*, 12 Mod. 254.

⁵ *Doe v. Laming*, 4 Campb. 77.

⁶ 5 Sandf. 242.

⁷ *Taylor v. Monnot*, 4 Duer, 116.

⁸ *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417. But in *Pettigrew v. Barnum*, 11 Md. 434, it was held, that the distinction between a boarding-house and an inn is, that in the former the guest is under a distinct contract for a certain time at a certain rate, and in the former the guest is entertained, from day to day, upon an implied contract.

Justice *Fletcher*, in delivering the opinion of the court, upon this point, places stress upon the fact that if one being a traveller or wayfaring man, is received as a guest at a common inn, he does not forfeit the right and protection attaching to that character, because he stipulates for the price to be paid, either by the day or week, or because he continues a longer time than is the common practice with guests.⁹

§ 579. But it is important to bear in mind, that a mere boarding-house keeper is not subject to the responsibilities or entitled to the rights of a common innkeeper.¹⁰ In this

⁹ The learned judge said, on this point: "It is further maintained for the defendants, that Russell was not a guest, in the sense of the law, but a boarder. But Russell surely came to the defendants' inn as a wayfaring man and a traveller, and the defendants received him as such wayfaring man and traveller, as a guest at their inn. Russell being thus received by the defendants, as their guest at their inn, the relation of innkeeper and guest, with all the rights and liabilities of that relation, was instantly established between them. The length of time that a man is at an inn, makes no difference, whether he stays a week or a month, or longer, so that always, though not strictly *transiens*, he retains his character as a traveller. Story on Bailm., § 477. The simple fact that Russell made an agreement as to the price to be paid by him by the week, would not, upon any principle of law or reason, take away his character as a traveller and a guest. A guest for a single night might make a special contract, as to the price to be paid for his lodging, and whether it were more or less than the usual price, it would not affect his character as a guest. The character of guest does not depend upon the payment of any particular price, but upon other facts. If an inhabitant of a place makes a special contract with an innkeeper there, for board at his inn, he is a boarder, and not a traveller or guest, in the sense of the law. But Russell was a traveller, and put up at the defendant's inn as a guest, was received by the defendants as a guest, and was, in the sense of the law, and in every sense, a guest."

¹⁰ *Dansey v. Richardson*, 3 Ellis & Bl., 144; s. c., 25 Eng. Law Rep. 76. There seems to be some question made in the English cases, in regard to boarding-house-keepers, whether there is any custody of the goods on the part of the keeper; whether in fact the servants are not the servants of the boarders, and their custody of the goods of the boarders the same as that of the boarders themselves. And the difference of opinion among the judges in the case just cited seems to turn upon this distinction. Lord Campbell, Ch. J., and Coleridge, J., held that the keeper of a boarding-house was bound, not merely to be careful in the choice of servants, but absolutely to supply the plaintiff with certain things, and to take due and reasonable care of his goods; and that if there had been a want of due care as regarded the plaintiff's box, it was immaterial whether the negligent act were that of the keeper or his servant,

case the plaintiff was a boarder or guest in the defendant's house upon the terms of a weekly payment, for board, lodging, and attendance. The plaintiff being about to leave the house sent one of the defendant's servants to purchase some biscuits, and he left the front door ajar, and while he was absent on the errand, a thief entered the house and stole a box of the plaintiff's from the hall. At the trial before Justice *Erle*, the learned judge directed the jury, that the defendant was not bound to more care of the house and the things in it, than a prudent owner would take, and that she was not liable, if there was no fault on her part

and that he could not excuse himself by showing that he had exercised ever so much watchfulness in selecting the servant. But on the contrary, *Wightman and Erle, JJ.*, held that the duty of the keeper of a boarding-house did not require that he should do more than to take all requisite care to employ, and keep none but trustworthy servants; and that if that had been done, the defendant was not liable for the single act of negligence on the part of the servant, in leaving the door open. The distinction seems to turn upon the different views entertained of what precise relation exists between the keeper of a boarding-house and the boarders; whether the boarder or the keeper holds possession of the rooms and the goods therein; whether, in short, the house is virtually given up to the boarders, and the keeper is merely a head-servant over the other servants, and all in the service of the boarders; or, on the other hand, the house, the servants, and all the goods therein, are in the possession and under the control and custody of the keeper, and he responsible for the faithfulness of the one and the safe custody of the other. There can be no question there are constant instances of both these kinds of boarding-houses, both in London and upon the Continent; but in this country, the latter class is more common, and indeed almost the only one which exists to any great extent. In this country the hotel-keepers act as boarding-house keepers to a large extent, and the only proper distinction between the two classes of houses here is, that the hotels entertain travellers as well as boarders, while boarding-houses have only the latter class; *ante*, n. 8, 9. The later English cases seem to have adopted the view that a boarding-house keeper has no custody of, or responsibility in regard to, the goods of the lodgers. In *Holder v. Soulby*, 8 C. B. (N. S.) 254, it was decided that the law imposes no obligation upon a lodging-house keeper to take care of the goods of his lodger, and where certain property of a lodger who was about to quit, had been stolen by a stranger who in his absence was permitted by the occupier of the house to enter the rooms for the purpose of viewing them, it was held the keeper was not responsible for the loss. But in this country, we apprehend, the view of the law, maintained by Lord *Campbell*, Ch. J., and *Coleridge*, J., is the one which is alone applicable to the ordinary relation existing between the keeper of inns and the inmates. The distinction between a boarding-house keeper and an innkeeper, is very clearly stated in *Pinkerton v. Woodward*, 33 Cal. 557.

in hiring and keeping the servant, and he left it to the jury to say whether, if the loss happened by the negligence of the servant in leaving the door ajar, there was any negligence on the part of the defendant in hiring or keeping the servant. The court being equally divided in opinion, on the question of granting a rule for a new trial, it failed, and judgment passed upon the verdict. The question at the trial was made to turn upon the responsibility of the defendant, for the particular act of the servant, in leaving the door ajar, and thus inviting the entrance of the thief, whereby the box was lost, which was confessedly an act of negligence on the part of the servant. And as no question seems to have been made that it was done within the range of the employment of the servant, there could be little doubt the rule *respondeat superior* must apply, and thus make the act of the servant the act of the master. So that in this particular case there seems to have been positive negligence. Such was the opinion of two of the judges, *Coleridge* and Lord *Campbell*. But the court seem to have been fully agreed, that in the case of a boarding-house keeper, there is no such extreme degree of responsibility, as in the case of an innkeeper. All that is required is the same which careful owners exercise in regard to their own goods of the like nature.

§ 580. And so if a guest takes a room for the purpose of business distinct from his accommodation as a guest, the special responsibility of an innkeeper does not extend to goods lost or stolen from that room.¹¹ This was where

¹¹ *Burgess v. Clements*, 4 Maule & Selw. 306; *Farnsworth v. Packwood*, 1 Holt, N. P. 209. In *Farnsworth v. Packwood*, 1 Holt, N. P. 209; s. c., 1 Starkie, N. P. 249, it was held that if a guest demand and have exclusive possession of a room for the purpose of a shop or warehouse, he exonerates the landlord from any loss he may sustain in the property which he keeps in that apartment. But if he have not an exclusive possession, it is here said, the landlord is responsible. *Le Blanc*, J., in laying down the law to the jury, said, "The guest may so conduct himself as to waive the common-law liability of the landlord." . . . "A landlord is not bound to furnish a shop to every guest. If a traveller applies for a room, not to sleep or live in, but as a shop or warehouse, and takes an exclusive possession, he exonerates the landlord."

the guest took a sales-room for exhibiting goods, at the inn where he was a guest, and the landlord told the guest there was a key and he might lock the door, which he neglected to do. Lord *Ellenborough*, Ch. J., in giving judgment for the defendant, said, "Now the law obliges an innkeeper to keep the goods of persons coming to his inn, *causa hospitandi*, safely, so that, in the language of the writ, *pro defectu hospitatoris hospitibus damnum non eveniat ullo modo*." "But if there be evidence that the guest accepted the key, and took on himself the custody of the goods, surely it is for the jury to determine, whether this evidence of his receiving the key proves that he did it *animo custodiendi*, and with a purpose of exempting the innkeeper, or whether he took it merely because the landlord pressed it on him, or for the purpose of securing greater privacy, in order to prevent persons intruding themselves into his room." The learned judge finally concludes, that as the room was intrusted to the plaintiff, for a special purpose beyond that of an ordinary or mere guest, and as he took a special charge of it, and the loss occurred through his omission of the ordinary precautions, he must be considered as in some sense responsible for the consequences of his own neglect of ordinary care. And although the early cases upon this point resort to some refinements, in exonerating the landlord from responsibility as an innkeeper, for goods placed in a particular room for sale, requiring evidence, that the guest took exclusive custody and care of the room, it seems very conclusive upon the point, that an innkeeper, as such, is not responsible for the safe custody of goods placed in a room for sale, any further than he consents, or contracts, to become so. It is certainly no part of his duty, as an innkeeper, to furnish rooms to guests, for that purpose. If he consents to do so, it is by way of special demise, and in no sense as landlord. He is therefore, at most, responsible as an ordinary bailee, and not to that extent, unless he retained the possession and control of

the room, so as to have the actual possession of the goods, which could hardly be the case, consistent with the use to which the room is ordinarily applied in such cases. We conclude therefore the innkeeper is not to be held responsible, in such cases, unless he contracts, either expressly, or by fair implication, to become so. And it will therefore be incumbent upon the plaintiff to establish such a contract or understanding, none resulting from the mere relation, as a presumption either of law or fact.

§ 581. There is a very elaborate note in Kent's Commentaries,¹² showing the history of legislation in this country, and to some extent in England, in regard to inns, taverns, and houses of public entertainment. It would seem that originally, in England, an inn was the only place where the traveller could always expect to find refreshment, both of food and drink, for man and beast. Taverns, at an early day in England, were places where wine was sold and nothing more. But in the course of time, it came to embrace other strong drinks, and finally, the furnishing of food and lodging to the traveller or wayfaring man, so that in the reign of Elizabeth, in England, there was no substantial difference between an inn and a tavern. And the terms have always been used in this country, as very nearly synonymous.¹³

§ 582. The subject of keeping inns or taverns, for public entertainment, has in nearly all the States been held, more or less strictly, under statutory regulations. Originally, in

¹² Vol. 2, p. 597, *et seq.*

¹³ The more ambitious of public-houses have in this country for many years rather repudiated both these terms, and affected to be called either "Hotels," or "Houses." But the general term, "House of public entertainment," is accepted as descriptive of what was originally the inn or hotel, thereby meaning the temporary home of the wayfarer.

It seems to be well settled that in those States where a license is required under the statute, in order to keep a house of public entertainment, the license is not indispensable to one becoming such an innkeeper, at common law, as to incur all the responsibility towards guests which the general law of the State imposes. *Norcross v. Norcross*, 53 Me. 163.

England, and to a great extent, in this country, it seems to have been, by general consent, the privilege of all who desired to undertake the business, to do so, without any license or recognition from the public authority. But it was not allowed, generally, for those volunteer places of public entertainment to keep spirits and wine, and especially the former. In many of the States, however, any one was, until a comparatively recent date, allowed to furnish fermented drinks to his guests.

§ 583. But in most of the States, at a very early day, the entire subject of keeping houses of public entertainment, as inns, taverns, or by whatever other name designated, was taken under the control of the State and subjected to license and the approval of the civil authority of the towns or cities. In this way the retailing of spirituous liquors and wines was confined almost exclusively to innkeepers. These persons were also required to be furnished with other reasonable accommodations for travellers, both man and beast, and to indicate their office by a public sign exhibited in some conspicuous place, on or about the house or curtilage.¹⁴

¹⁴ 2 Kent, Comm. 597, in note. The learned author here says, "N. Y. Revised Statutes, vol. i. pp. 678-682; id. 661, sec. 6; By the statute, every keeper of a public inn or tavern, except in the city of New York, is required to keep at least two spare beds for guests, well provided, and good and sufficient stabling, grain, hay, or pasturage, for horses and other cattle belonging to travellers. Every innholder or tavern-keeper, who is licensed as such, is also required to put and keep up a proper sign on or adjacent to the front of his house; and every person who erects or keeps up such a sign without a license to sell spirituous liquors by retail, or sells them by retail to be drunk in his house, out-house, yard, or garden, without entering into recognizance as an innkeeper, is subjected to a penalty for every offense. If the innkeeper has not put up a sign, yet if he keeps a tavern, he is still responsible at common law as an innkeeper. Cayle's case, 8 Co. 32. At common law, any person might keep a tavern and sell vinous liquors there without control; but under the English statute of 5 & 6 Edw. IV., a license to keep a tavern would not authorize the retail of liquors without another license. *Stevens v. Duckworth*, Hard. 338. The better opinion would seem to be, that under the New York statute there may lawfully be a public inn without an excise license, though without a license no person can put up a sign *indicating that he keeps a tavern*; and if he has the excise license to retail in small quantities

§ 584. From what we have said, and from all the cases upon the point, it would seem, that those persons who are liquors to be drunk in his house, he must be bound also to keep an *inn* for the accommodation of travellers, in the common-law sense of the term. The excise license may perhaps be regarded as a criterion to determine between the common-law *inn*, and the statute *inn* and *tavern* combined. In the case of the Overseers of Crown Point v. Warner, 3 Hill, 150, occurring in 1842, since the preceding observations were made, it was adjudged that the words *inn* and *tavern*, and *innholder* and *tavern-keeper*, were used in the N. Y. R. S. vol. i. p. 676, synonymously, and that the right to keep an inn without an excise license is common to all persons. But if a license to sell spirituous liquors be added, the inn then becomes a statute franchise, and the statute regulations prescribing rules of conduct to inn and tavern keepers, apply *only* to such licensed houses. By a statute of New York of 12th April, 1843, ch. 97, licenses to keep taverns may now be granted, without including a license to sell spirituous liquors or wine. So in Alabama, no person can keep a public inn without a license, though spirituous liquors be not retailed. The State v. Cloud, 6 Ala. (N. S.), 628. The Act of Michigan of 1833, is essentially the same, for no person, *unless licensed to keep a tavern*, can sell spirituous liquors by retail under a quart. In Pennsylvania, a license to keep a *tavern* or *inn*, would seem, *ipso facto*, to imply a license to retail vinous and spirituous liquors, though licenses to sell liquors may be granted to persons combining other business with the same. Purdon's Dig., 502 - 507. By the law of Ohio, no person is permitted to keep a *tavern* without a license from the Court of Common Pleas of the county. Statutes of Ohio, 1831. By the Act of Kentucky of 1834, no tavern within any town or city, or within one half mile thereof, can be kept without license, *even though spirituous liquors be not retailed*. So, in Vermont, no person can keep an *inn* without a license from the county court; and a license to keep a victualing-house will not authorize a person to keep a house for public entertainment; and a person may keep an inn without selling spirits or wine. State v. Stone, 6 Vermont, 295. In Connecticut, a distinction is made by statute between taverns and victualing-houses. Both kinds require a license, but tavern-keepers only have a right to retail spirituous liquors. The victualing-houses are called, also, houses of refreshment. Statutes of Connecticut, 1838, pp. 592 - 595. In Massachusetts, there seem to be three descriptions of persons in purview of the Revised Statute, c. 47: (1.) a common innholder, who sells liquors and provides accommodation for man and beast; (2.) A common victualler, who sells liquors and food only. Both of these must be licensed; (3.) A common grog-shop, or drinking-house keeper, who is not entitled to a license. Commonwealth v. Pearson, 3 Metcalf, 449. In North and South Carolina, a person is indictable for retailing spirituous liquors without license; and in the former State, public inns are called, in the statute, ordinaries. 1 N. C. R. S. p. 445; State v. Morrison, 3 Dev. (N. C.) 299; The State v. Mooty, 3 Hill (S. C.) 187. Tavern-keepers and innholders are generally used synonymously; and as the local laws in all the States prohibit persons from retailing spirituous liquors, and in Alabama, by Act of 1807, even beer or cider, without a license, that license ordinarily becomes essential to the character, and in some instances, to the lawfulness of a public inn or tavern. In Tennessee, the prohibition

appointed and licensed for the office, and all others, who are in the exercise of the office of keeping a house of pub-

to retail spirituous liquors is held not to include wine which is procured by fermentation, and only those liquors which are procured by distillation. *Caswell v The State*, 2 Humph. 402. Since the growth and diffusion of temperance societies, the restrictions by law on the retail of spirituous liquors have greatly increased. In Massachusetts, by statute, in 1838, the retail of spirituous liquors under fifteen gallons was wholly prohibited. By the Revised Statutes of Massachusetts of 1836, ch. 47, no person can be an innholder or seller of spirituous liquor, to be used about his house or other building, without license. Licenses to innkeepers and retailers may be granted for each town and city, and licenses *may be* confined to the sale of fermented liquors, such as wine, beer, ale, and cider, and excluding the sale of brandy, rum, or other spirituous liquors. The interdiction in Mississippi was limited to one gallon, and in most of the States the regulations on the subject have become very strict. The laws of the Old Plymouth Colony (edit. 1836, by W. Brigham, p. 287) declared that no person licensed to keep a public house of entertainment *should be without good beer*.

Innkeepers are liable to an action if they refuse to receive a guest without just cause. See *infra*, p. 634. The innkeeper is even indictable for the refusal, if he has room in his house, and the guest behaves properly. *Rex v. Ivens*, 7 Carr. & Pa. 213. In the case of *The State v. Chamblyss*, 1 Cheves (S. C.) Rep. 220, the subject of inns and taverns was elaborately discussed. It was held by a majority of the court, that a license to keep a *tavern* included, also, the privilege of retailing spirituous liquors, in small quantities, to travellers and guests. The minority of the court held, that the tavern license and the license to retail were two distinct things, and that the former license did not necessarily include the other. It would appear from the learned investigations in that case, that a *tavern* was originally a place where the keeper sold wine alone, but, in process of time, the seller of wine (including other strong drinks) began to supply food and lodging for wayfaring men, and the term *tavern* became to be synonymous with that of *inn*, as far back as the reign of Elizabeth. The preamble to the statute of 1 James I. c. 9, declared, that "the ancient, true, and principal use of inns, ale-houses, and victualling-houses, was for the receipt, relief, and lodging of wayfaring people, travelling from place to place, and not meant for entertainment and harboring of lewd and idle people," etc. The statutes of 2 James I. c. 7, 4 James I. c. 5, and 1 Chas. I. c. 4, show, also, the primitive use of the inn, now commonly called a tavern. In the statutes of South Carolina, both under the Colony and under the State, inns and taverns have been used promiscuously for places where spirituous liquors were sold under a license. But there were licensed retailers of spirituous liquors who do not keep a tavern, and there were licensed retailers who keep a tavern and retail spirituous liquors as part of the entertainment, together with food, lodgings, etc., for travellers and wayfaring people. The mere business of entertaining travellers and others with food, lodging, etc., does not require an excise license. They are not tavern-keepers within the purview of the excise laws, but innkeepers, in the primitive sense, and they are entitled to some of the privileges and subject to some of the liabilities of keepers of taverns. I presume they are responsible for the goods of their guests to the ex-

lic entertainment for all travellers and others, desiring food and lodging for shorter or longer periods, are to be regarded as innkeepers, and are subject to all their responsibilities and entitled to all their rights and privileges. But that a person keeping a boarding-house or victualing-house, is not to be regarded in the light of an innkeeper either as to duty, right, or responsibility.¹⁵ We shall have occasion hereafter to define the exact distinction between innkeepers and others, upon some particular points, more precisely than we have now done. But the preceding will suffice for the general outline of the definition of that office.

tent of innkeepers and tavern-keepers at common law. The regulations of some late English statutes (11 Geo. IV. and 1 Wm. IV. c. 64, and 4 & 5 Wm. IV. c. 85) are very strict even as to beer-houses. No person licensed to sell beer by retail shall have or keep his house open for the sale thereof, nor retail the same, or suffer it to be drank in or at his house before 4 A. M. and after 10 P. M.; nor at any time between 10 A. M. and 1 P. M.; nor between the hours of 3 and 5 o'clock P. M. on Sundays.

¹⁵ *State v. Stone*, 6 Vt. 294; *ante*, n. 2, 4, 5, *et seq.*

CHAPTER III.

WHO ARE ENTITLED TO THE PRIVILEGES AND SUBJECT TO THE RESPONSIBILITIES OF GUESTS.

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| <p>§ 585. <i>A guest must become the patron of an inn or public house.</i></p> <p>§ 586. <i>The particulars which must concur in order to constitute one a guest.</i></p> <p>§ 587. <i>One may acquire the rights of a guest, as to his horse, by leaving him at the stable of an inn.</i></p> <p>§ 588. <i>So too where, in addition to that, the guest took some of his meals at the inn.</i></p> <p>§ 589. <i>The American cases seem to take the same view.</i></p> <p>§ 590. <i>Further discussion of what constitutes the relation of guest and landlord.</i></p> | <p>§ 591. <i>Restaurant-keeper not responsible as innkeeper. But one who occasionally entertains travellers may be an innkeeper.</i></p> <p>§ 592. <i>But one is clearly not responsible, as such, to one not a guest.</i></p> <p>§ 593. <i>The innkeeper is responsible for injury to a horse left at his stable, while driven for exercise.</i></p> <p>§ 594. <i>One wishing to become a guest at an inn, and ready and willing to pay for his entertainment, may recover damages for refusal to receive him.</i></p> |
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§ 585. THE subject of this chapter is so precisely the correlative of the last, that it will not be entirely practicable to present the law upon the two topics entirely distinct. In general terms all who become the patrons of an innkeeper, in his capacity as such, are guests; and consequently entitled to the rights and exposed to the liabilities pertaining to that character. But it is requisite to that end, that one become the guest of an innkeeper, not of a victualler or boarding-house keeper, or of a farmer or other person.

§ 586. (1.) It is requisite, then, that the place where entertainment is sought, be a common inn. (2.) The guest must become a patron of the inn upon the expectation of both parties, that he pay for what he receives. For, if one stay at an inn as a mere visitor, or upon charity, or in any

other capacity except that of a guest for pay, he will not be entitled to claim the protection of the rules of law governing the responsibilities of innkeepers. (3.) The guest must not have changed his relation of a transient guest to that of a permanent boarder. For if so he is no longer entitled to claim that higher degree of responsibility which attaches to the office of innkeeper; but only that degree of watchfulness and responsibility, which attaches to the ordinary relations of bailment for hire or reward. Neither is a mere boarder subject to the responsibilities of a guest, as to a lien upon the effects which he carries with him. There may be some other distinctive features of the character of guest, which will appear in other chapters; but these are the more prominent, and the principal authorities bearing upon the points have been referred to in the last preceding chapter.¹

§ 587. But there have been some decisions upon this very point, of what is requisite to constitute one a guest, which we have not yet referred to. Thus, at an early day,² it was decided, by a divided court, that one became a guest by putting his horse at an innkeeper's stable, and the lien of the innkeeper for the keep of the horse was maintained, which could only have been done upon the ground that the owner was a guest of the inn of which the stable was originally an indispensable appurtenance; since ordinary stable-keepers have no lien upon horses for their keep. This case has ever since been quoted by courts and elementary writers, with approbation, and the point may therefore be regarded as fully established. But it has been considered that in order to constitute one a guest he must leave something in the custody of the innkeeper from which the latter is expected to derive profit, and not a mere dead thing, as a trunk.³ It is said by one author

¹ *Ante*, ch. ii. and cases cited. See also *McDaniels v. Robinson*, 26 Vt. 316, where the subject is extensively discussed and the cases cited.

² *York v. Grindstone*, 1 Salkeld, 388; s. c., 2 Ld. Ray. 866; *Yelv.* 67.

³ *Gilley v. Clark*, Cro. Jac. 188; *McDaniels v. Robinson*, 26 Vt. 316.

of great accuracy,⁴ "If a traveller leave his horse at an inn and lodge elsewhere, he is, for the purpose of this rule, to be deemed a guest."

§ 588. So too it seems to be well settled that one may become a guest by going to an inn for mere temporary refreshment, either food or drink.⁵ And in *McDaniels v. Robinson*,¹ where the question was very carefully examined, it was decided that the relation of guest is created by a person putting his horse at an inn, and taking a room and taking some of his meals there, and lodging there a portion of the time; and the special protection

⁴ 1 Smith's Leading Cases, 50, note to Cayles' case, 8 Co. Rep. 32; S. P. 3, Bac. Ab., Tit. "Inns and Innkeepers," c. 5, p. 666; Chitty on Contracts, 476. "A person may be a guest, though he merely leave a horse at the inn and himself lodge elsewhere." *ib.*

⁵ *Bennet v. Mellor*, 5 T. R. 273. This case is one of the slightest in the books as to the amount of entertainment, but there seems to have been no question in regard to the responsibility of the innkeeper. The plaintiff's servant, carrying goods to market and being unable to dispose of them, went to the inn and desired to leave them there for safe keeping until the next market day. The landlady refused to take them on account of the great number of parcels already in her keeping, or said "she could not tell" whether he could leave them. "The plaintiff's servant then sat down in the inn, had some liquor, and put the goods on the floor immediately behind him. When he got up, after sitting there a little while, the goods were missing." The court seemed to entertain no question, that if the landlady had accepted the goods on the special bailment, she would only have been responsible for their safe custody, as an ordinary bailee for hire. *Buller, J.*, so laid down the law at the trial. But as the servant stopped at the inn for refreshment and had some liquor, he was, for the time, a guest; and *Buller, J.*, said, "It is clear that the goods need not be in the special keeping of the innkeeper in order to make him liable; if they be in the inn that is sufficient to charge him." In *Cayles* case it is said, "Although the guest doth not deliver his goods to the innholder to keep, nor acquaint him with them, yet if they be carried away or stolen, the innkeeper shall be charged." And *Grove, J.*, said, "According to Cayles' case . . . if a man go into an inn and is accepted there as a guest, the innkeeper is bound to take care of the goods of the guest." These last words, from the opinion of *Grove, J.*, seem to us to place the exact definition of what is requisite to create the relation of landlord and guest, upon the clearest and most unquestionable ground of anything to be found in the books, in so compact form. The same rule substantially is adopted in a late case in *Maine, Norcross v. Norcross*, 53 Me. 163. See also *Pinkerton v. Woodward*, 33 Cal. 557. It is here said one does not cease to be a guest by proposing to remain a given number of days, or by stipulating a fixed price, or by paying in advance, or as his demands are complied with.

which the law provides at an inn will, in such case, extend to all his goods left at the inn, which in the present case was \$4,000 in gold, the landlord consenting to accept it in a bag. And it was here said, that the delivery and acceptance of the goods by the innkeeper, constitute a sufficient consideration for any undertaking in regard to them, even when the service is gratuitous. And also where, as in this case, the innkeeper was requested to deliver the money to a third person for safe keeping, it was held not to release the obligation of innkeeper, unless, or until, performed; it being only a mode provided by the parties, to enable the innkeeper to release his obligation, as such, and without the purpose of releasing the higher duty, unless the innkeeper should elect to do that, by creating the new security, according to the request of the bailor. But if the bailee, instead of electing to hand the money over to the party designated, choose to retain it in his own custody, there was no sufficient reason why he should not be held to the same responsibility for its safe keeping as before.

§ 589. And the American cases seem fully to sustain the propositions maintained in the two preceding sections. Thus in *Mason v. Thompson*,⁶ it was held that an innkeeper becomes responsible as such, for the safe keeping and return of a chaise and harness, left in his custody by a traveller, who put his horse at the inn, and himself put up with a friend. And the same rule is declared in *Peet v. Graves*.⁷ And the American cases,⁸ which have been quoted to establish the opposite view, do not go beyond declaring, that an ordinary stable-keeper is only responsible for that degree of care, which is required of ordinary bailees for hire.

⁶ 9 Pick. 280.

⁷ 25 Wend. 653.

⁸ *Grinnell v. Cook*, 3 Hill. 486; *Thickstun v. Howard*, 8 Blackf. 535; *Hickman v. Thomas*, 16 Alabama, 666.

§ 590. In a recent case in New York,⁹ it was decided, in conformity with the rule before stated, in regard to common carriers,¹⁰ that an innkeeper may by special arrangement receive property as bailee, and only the responsibility of a bailee will attach to him; but the burden of proving that he accepted the goods in a different capacity from that of innkeeper rests upon him. It was also here said, that the foundation of the innkeeper's responsibility, as such, was created by the existence of the relation of landlord and guest, and that it is not easy to define precisely what constitutes the relation. But it was here considered that by the merely leaving one's horse at the stables of an inn, to be cared for by the innkeeper, but where he himself made no offer to become a guest, but ate, drank, lodged, and was provided for, at a different place, the innkeeper was not responsible for the safety of the horse except as an ordinary bailee. But where an innkeeper agreed with the owner of a horse to entertain the man having charge of the horse, one day in the week, or oftener, if he should stop there with the horse, furnish him provender, and allow him to be kept in a certain stall, none but the man having charge of the horse to have the care of him, at the stable, and the horse was injured in the stall, it was held the innkeeper was responsible for the safety of the horse, unless damage occurred by inevitable accident or from the public enemy.¹¹ The question as to the distinction between guests and boarders at a hotel, and the liability of the landlord to each for the loss of goods, was considered in a case in Alabama.¹²

⁹ *Ingalsbee v. Wood*, 36 Barb. 452. And where the keeper of an inn is accustomed to receive packages for the accommodation of his guests and thus takes in charge goods which do not properly come under the denomination of travelling baggage, he nevertheless becomes responsible for the safety of such things, in his capacity of innkeeper. The custody of the goods is merely an accessory of the relation of guest. *Willard v. Reinhardt*, 2 E. D. Smith, 148.

¹⁰ *Ante*, pt. ii., ch. xii., xiii.

¹¹ *Washburn v. Jones*, 14 Barb. 193.

¹² *Chamberlain v. Masterson*, 26 Alabama, 371. It was here held that a

§ 591. It has been decided that a restaurant is not an inn, nor can the responsibilities of innkeepers be extended to the proprietors of such establishments.¹³ But in regard to one who lived in a sparsely settled portion of country, and whose house was visited by travellers, and all who came entertained by him, and charged as guests, and these facts were notorious and relied upon by travellers, although the keeper of the house disclaimed being an innkeeper and refused to take boarders, and often entertained his friends and others free of charge, it was held the evidence justified the jury in finding him a common innkeeper.¹⁴

§ 592. It is unquestionable, that in order to hold the innkeeper responsible, as such, it must not only appear that he kept an inn, but that the damages happened to the plaintiff while he sustained the relation of guest.¹⁵ In the last case a ball was given by a fire company at the defendant's hotel, who furnished the necessary rooms and was paid an agreed price for their use. The ball was managed exclusively by the company. The plaintiff, on going to the ball, delivered his overcoat, fur collar, and gloves to the clerk, at the office of the hotel, and registered his name, and remained at the ball most of the night, and spent money at a tent kept by the defendant in connection with the hotel. It was held the defendant was not responsible as innkeeper, for the loss of the property, because the defendant was not a guest. But where the defendant went to an inn with his man and two race-horses, in the character of guest, and remained several months, taking the horses out for exercise and training every day, and being absent occasionally, several days together, at races, in different parts of the country, but always with the intention to return to the inn, it was held,

boarder at a hotel, who did not take such care of his watch as men of ordinary prudence are accustomed to take, could not charge the loss upon the landlord.

¹³ *Carpenter v. Taylor*, 1 Hilton, 193.

¹⁴ *Howth v. Franklin*, 20 Texas, 798.

¹⁵ *Carter v. Hobbs*, 12 Mich. 52.

that in the absence of evidence of any change of relation of the parties, that of innkeeper and guest must be presumed to continue.¹⁶

§ 593. In a somewhat recent English case¹⁷ where by an arrangement between an innkeeper and his hostler, he had the profits of the stables, paying no rent, but providing hay, corn, etc., and supplying not only the guests in the inn, but residents in the town, whose horses he was allowed to take care of. One, who had no knowledge of the arrangement, arrived at the inn, with his horse and gig, which were taken to the stable and he became a guest. He subsequently left, saying he should not be back till the following Monday, and requested that his horse should be attended to. He did not return for a fortnight, and in the mean time the hostler, for the purpose, as he said, of exercising the horse, drove it out, when it took fright at a locomotive steam-engine and was injured. It was held the relation of innkeeper and guest subsisted between the parties, and consequently the defendant, the innkeeper, was responsible for the injury done to the horse.

§ 594. As to the right to become a guest at a common inn, there seems never to have been any question. Any one may claim that right who is of good character and demeanor and ready to pay for what he may call for; and upon unreasonable refusal, he may maintain an action for the recovery of damages.¹⁸ But the innkeeper may excuse himself, if he have no more room, or his servants are ill, or have deserted him, without his fault, and he have not had time to supply others, or for any other good reason. The law is thus stated by *Coleridge, J.*¹⁹ An indictment lies against an innkeeper who refuses to receive a guest, he having room at the time, and it is not neces-

¹⁶ *Allen v. Smith*, 12 C. B. (N. S.) 638. This case was affirmed in the Exchequer Chamber, 9 Jur. (N. S.) 1284.

¹⁷ *Day v. Bather*, 2 H. & C. 14; s. c. 9 Jur. (N. S.) 444.

¹⁸ *Hawthorn v. Hammond*, 1 Car. & Kir. 404.

¹⁹ *Rex v. Ivens*, 7 C. & P. 213.

sary for the guest to tender the price of his entertainment if the objection to receive him is not upon that ground. And it is no defense for the innkeeper, that the guest was travelling on Sunday, and at an hour of the night after the innkeeper's family had gone to bed; nor is it any defense that the guest refused to tell his name and place of abode, as the innkeeper had no right to insist upon knowing these particulars; but if the guest called at the inn drunk, or behaved in an indecent or improper manner, the innkeeper is not bound to receive him. But in *Fell v. Knight*²⁰ it is suggested, that in order to support an indictment or action against an innkeeper for refusing to receive a guest, or for turning him out doors, the declaration should allege that a tender was made of a reasonable sum to defray the expenses of the entertainment, or else show such special circumstances as rendered the tender impossible, and that the rule laid down above on this point is not maintainable. But in analogy to other cases, where readiness to pay is a condition of the right to demand service, we should incline to the view that no actual tender is required in such cases, unless objection is made on that point, and that the declaration need only allege that the guest was ready and willing to pay in advance if required, upon being received into the inn. And although one may exclude a guest from his inn because he is disorderly or for any other sufficient reason, he cannot do it, because the person who offers himself as a guest, is the agent for a rival line of stages to that which brings its passengers to that house.²¹ In a recent case in Kentucky,²² it was decided that an innkeeper is bound to receive and entertain all applicants, whether adults or infants who are apparently responsible and of good conduct; if he refuses he will be liable to an indictment.

²⁰ 8 M. & W. 269. As to the general right to recover damages for an improper refusal to receive one as a guest at an inn or house of public entertainment, see opinion of *Bayley, J.*, in *Thompson v. Lacy*, 3 Barn. & Ald. 283; *ante*, n. 3.

²¹ *Markham v. Brown*, 8 N. H. 523.

²² *Watson v. Cross*, 2 Duvall, 147.

CHAPTER IV.

THE EXTENT OF THE INNKEEPER'S RESPONSIBILITY.

- § 595. *He is responsible presumptively for all losses, and can excuse himself only by showing that he did all in his power to prevent it.*
- § 596. *Many of the recent cases state the responsibility of innkeepers to be the same as that of common carriers. It comes so near that in truth that the difference is of little practical importance.*
- § 597. *Still there is in strictness no responsibility, unless the innkeeper, or the inmates of his house, are some way in fault.*
- § 598. *He is responsible for all the money and other articles the guest finds it convenient to carry with reference to his expenses and his business. And if money is stolen from the guest he may recover, although he omitted to put it in the safe.*
- n. 7. *But this will depend somewhat upon the amount and the use.*
- § 599. *The same subject further discussed. The obligation upon the guest, to place his money in the safe seems to depend upon the amount and what is prudent.*
- § 600. *The guest must deposit his goods in the ordinary place, in care of the proper person.*
- § 601. *There is no particular course to be adopted by the guest except to be prudent. It is the duty of the host to be watchful at all points.*
- n. 14. *He must not trust to the opinion of his guest; but see to it himself that the goods are positively kept safe, as far as in his power. The omission of the guest to fasten his door, etc., will not excuse indifference on the part of the host. Where the guest exposes his money to be seen by others and then leaves it within their reach, he has no redress if it is stolen.*
- § 602. *The guest must either take exclusive possession of his goods, or else utterly disregard all ordinary precautions for safety, in order to exonerate the innkeeper.*
- § 603. *To charge the guest with negligence, exonerating the innkeeper, it should appear the guest fully understood the danger and persisted in leaving his goods exposed.*
- § 604. *Some of the cases seem to limit the innkeeper's responsibility to wearing apparel and articles necessary for present personal use.*
- § 605. *The true rule seems to be, that the innkeeper is responsible for all money and other property the guest finds it convenient to have, with him, he using all reasonable precautions himself not needlessly to expose it to loss.*

§ 595. THERE has been considerable discussion, first and last, in regard to the precise extent of the innkeeper's re-

sponsibility, under the English common law. In preparing an opinion upon the point, some years since, in the Supreme Court of Vermont, we had occasion to examine the cases very extensively, and we could not better express our own views upon the subject than by adopting what we then said.¹ We should now state the rule of law in regard to

¹ *McDaniels v. Robinson*, 26 Vt. 316, 335. "In regard to the general liability of an innkeeper, it is surprising that the law should still be so indeterminate. But the cases are fewer and less decisive upon this important subject than might have been expected. Even the absurd dictum in *Newton v. Trigg*, 1 Shower, 269, where *Eyres, J.*, says, '*They (innkeepers) may detain the person of the guest who eats,*' has been constantly quoted to establish the existence of such a right in the landlord, and without much examination (although the point decided in the case is, whether an innkeeper may become a bankrupt), until the comparatively recent case of *Sunbolf v. Alford*, 3 M. & W. 247, where Lord *Abinger* says, 'I would be sorry to have it thought I entertain any doubt in this case, or required any authority to support the judgment I propose to give,'—that no such right to detain the person of the guest can be for a moment tolerated in a free country. So, too, we find numerous creditable judges, and some decisions, carrying the liability of an innkeeper to the full extent of a common carrier, and thus making him an insurer against all losses not caused by the act of God or the public enemy. But such is clearly not the general course of the decisions in Westminster Hall, and that extreme responsibility was expressly repudiated by this court (*Merritt v. Claghorn*, 23 Vt. 177).

"It is there held that an innkeeper is not liable for loss of goods of the guest by fire from without, the probable act of an incendiary, and without any fault or negligence on his part, or on the part of any inmate of the house. But we have never intimated that we were prepared to put the liability of an innkeeper upon the same ground as that of other bailees. On the contrary, we regard it as well settled that the liability of an innkeeper is greater than that of any other bailee, with the single exception of common carriers. In *Richmond v. Smith*, 8 B. & C. 9 (15 Eng. Com. Law, 144), Lord *Tenterden* says, in regard to goods stolen from the custody of an innkeeper, 'The situation of an innkeeper is precisely analogous to that of a carrier.' This may be too strongly expressed, if applied to all cases of goods taken from the custody of an innkeeper. For it may be done by superior force, and without his fault, and still not the force of a public enemy, which is necessary to be shown to excuse a carrier. But in regard to goods stolen from the custody of an innkeeper, and no evidence to show how it was done, or by whom, the liability is the same as that of the carrier. The innkeeper is bound to keep his house safe from the intrusion of thieves, day and night, and if they are allowed to gain access to the house, and especially without the use of such force as will show its marks upon the house, it is fairly presumable that it was either by the negligence or connivance of the host, and such is the judgment of the law thereon.

"Perhaps the rule of law as applicable to such a case is better expressed by

the extent of the innkeeper's responsibility to be, that he is presumptively responsible for all injuries happening to

Mr. Justice *Bailey*, in this same cause: 'It appears to me that an innkeeper's liability very closely resembles that of a carrier. He is *primâ facie* liable for any loss not occasioned by the act of God, or the king's enemies.' And Mr. Justice *Story* lays down the rule in regard to this liability as correctly as it can be stated, in his work on *Bailments*, § 472: 'But innkeepers are not responsible to the same extent as common carriers. The loss of goods while at an inn will be presumptive evidence of negligence on the part of the innkeeper or his domestics. But he may, if he can, repel the presumption, and show that there has been no negligence whatever, or that the loss has been occasioned by inevitable casualty or superior force?' And in the case of *Dowson v. Chamney*, 5 Ad. & Ellis (N. S.) 164, (48 Eng. Com. Law, 164,) Queen's Bench, 1843, Lord *Denman* in giving judgment, quotes these words of Mr. J. *Story* with approbation, and substantially bases the judgment of the court upon them. Pothier's exposition of the civil law liability of this class of bailees is much the same. The Institutes of Justinian, lib. iv., tit. 6, § 3, thus lay down the rule: '*Item exercitor navis, aut cauponæ, aut stabuli, de damno, aut furto, quod in navi, in caupona aut stabulo, factum erit, quasi maleficio teneri videtur.*' The innkeeper, it seems, was thus made liable for all damage or theft, the same as if it arose from his positive wrong. If it happened, it was in law regarded as his wrong, *quasi ex maleficio teneri videtur*. And the perpetual edict of the prætor, which has formed the basis of the commentaries of most of the civil law writers upon this subject, is little more than an amplification of the text of the Institutes. The Code Napoleon, book iii., tit. 2, § 5, 1953, is scarcely more than a translation of the Institutes: 'They (innkeepers) are responsible for the stealing or damage of the property of the traveller, whether the robbery were committed, or the damage were caused, by the domestics and officers of the establishment or by strangers going and coming within the inn:' 1954, *ib.*: 'They are not responsible for robberies committed with armed force, or any other superior force.' These two maxims seem to embody the substance of our law upon the subject at the present time; in confirmation of which we would further refer to the following English and American cases: *Clute v. Wiggins*, 14 Johns. 475. In this case, a wagon loaded with bags of grain was put in a wagon-house, which was broken open; 'from which,' say the court, 'it is to be inferred that the building was closed, and the doors fastened in such a manner as to promise security.' Still the defendant was held liable. The innkeeper is liable for goods stolen from any part of his house, unless he expressly limit his responsibility, and this is assented to by the guest (*Richmond v. Smith*, *supra*). He is responsible for money belonging to his guests (*Kent v. Suchard*, 2 Barn. & Ad., 803; 22 E. C. L. R. 186). And he is responsible for the acts of every one within his house, unless introduced by the guest, as all the cases agree (*Townson v. The Havre de Grace Bank*, 6 Harr. & Johnson, 47).

"It may be important to consider how far the defendant is here liable for a burglarious entry of his house from without, which the case says he claimed, and gave testimony tending to prove. The detail of the evidence not being given, it is impossible to determine whether the burglary was of a character, if proved, which would exonerate the defendant; for although the authorities are not

the goods of his guests and by them entrusted to his care; and that he cannot exonerate himself except by showing that he did all to insure their safety, which it was in his power to do, and that no default is attributable to his servants or guests.

§ 596. This brings the rule of law on this subject so near to that which obtains in the case of common carriers, that the distinction is not of much moment unless in cases of loss by accidental or incendiary fires, and possibly in some few other cases. Hence it is now becoming, to some extent, common for the courts to state the degree of responsibility of these two classes of persons in the same or similar terms, and thus to declare that innkeepers are responsible for the safety of the property of their guests, except for damage resulting from inevitable accident or irresistible force, being that of the public enemy. Thus in a recent English case² it was declared, that an innkeeper, although

decisive, or altogether coincident upon this subject, it must be obvious to all that an ordinary burglary, such as might have been expected to happen, upon proper temptation, should have been provided against by the host, and the omission to do so is itself negligence. And the recent decisions seem rather to incline to the view that the host is liable for all losses of the goods of his guest, even by burglary or robbery, unless produced absolutely by superior force, the *vis major*, of the schools. Chancellor *Kent*, in *Comm. 2*, vol., page 759 (593 in *William Kent's ed.*), seems to incline to this view as the fair result of *Mason v. Thompson and Richmond v. Smith*. Mr. Justice *Story*, in the later edition of his *Bailments*, seems to incline to the same view (page 309, 2d ed). And ordinarily, an intrusion into a house by robbers from without, or burglars, must be attended with force and fracture, and more or less noise and alarm, no doubt; and in this peaceful portion of the country to have happened, and leave no vestige, would be fairly calculated to excite suspicion against the host, of negligence at least. And where marks of the intrusion are found, so as to leave no doubt of the mode of the loss, it must still be a question how far the house was properly fastened. And following the general rule of diligence, on the part of innkeepers, of 'uncommon care,' as laid down by Lord *Holt*, or, as some of the books have it, 'the extremest care,' it would certainly be incumbent upon them so to fasten the inn itself, where their guests lodge, that it would not be liable to be broken by common force or art. But I can comprehend that money might be lost by a burglarious entry, under peculiar circumstances, without affording any just ground of imputing even negligence to the innkeeper; and in such case, notwithstanding some dicta to the contrary, I should myself incline to the opinion that the innkeeper is not, upon principle, holden."

² *Holder v. Soulby*, 8 C. B. (N. S.) 254.

guilty of no negligence, is liable for the loss or injury of the goods of his guest, not arising from the negligence of the guest, the act of God or the Queen's enemies. And in a late case in New York,³ the rule of responsibility is stated in the same precise terms. And although the rule is stated in less extreme terms, in most of the approved elementary writers, and in many, probably a majority of the cases, as shown in *McDaniels v. Robinson* and in *Merritt v. Claghorn*,⁴ we shall not deem it important to occupy much space upon the point.

³ *Hulett v. Swift*, 42 Barb. 230; s. c., 33 N. Y. 571; s. p., *Gile v. Libby*, 26 id. 70. The same rule adopted in *Norcross v. Norcross*, 53 Me. 163. And it was here held, as in most other cases upon the point, that the burden of showing the loss within the exempted risks was upon the innkeeper.

⁴ 23 Vt. 177. In this case the plaintiff's property was in the defendant's custody as innkeeper, and was destroyed by an accidental fire without any fault of defendant, and the court held the action could not be maintained. It was there said, —

"The question, then, is, 'Whether the defendant is liable? Do the authorities justify any such conclusion? For it is a question of authority mainly. We know that many eminent judges and writers upon the law have considered, that innkeepers are liable to the same extent as common carriers. It may be true, that the cases are much alike in principle. For one, I should not be inclined to question that. But if the case were new, it is certainly not free from question how far any court would feel justified in holding any bailee liable for a loss like the present. But in regard to common carriers, the law is perfectly well settled, and they contract, with the full knowledge of the extent of their liability, and demand, not only pay for the freight, but a premium for the insurance, and may reinsure, if they choose. And the fact, that carriers are thus liable, no doubt often induces the owners to omit insurance. But unless the law has already affixed the same degree of extreme liability to the case of innkeepers, we know of no grounds of policy merely, which would justify a court in so holding.

"In regard to the authorities relied upon by the counsel for the plaintiff, the case of *Bedlo v. Morris*, Yelv. 162, decided as early as 7 Jac. 1, makes nothing either way upon this point. The declaration only claims, that the defendant is liable for 'goods lost, through the default of the defendant, or his servants;' and no case questions the liability to this extent. The dictum referred to in argument in the *Doctor and Student*, only shows, that innholders are liable for a robbery, committed upon their guests by the servants of the house. But this is upon the ground of want of proper care in keeping such servants. The host is, we apprehend, upon principles of reason and justice, always liable for any act of his servants or guests. He employs such servants as he chooses, and is bound to take every quiet and orderly guest which offers, and if he takes others, even in good faith, it ought not to be at the risk of his other guests, who derive no profit and

§ 597. Notwithstanding this tendency of the modern cases, and many of the earlier ones, to place the responsi-

have no concern whatever in their being there. In holding the innkeeper liable to this extent, all opinions concur. It is here the discrepancy begins.

"Morse v. Slue, 1 Vent. 190, decides nothing, for the case was compounded. But the case was one of common carrier, by ship, as early as the 24 Car. 2, and doubts seem then to have existed, whether even common carriers were liable, without any default; but the law is clearly against them now upon that point. The declaration in this case seems to be much the same in substance as that in Yelverton, which is a ground of argument; perhaps the extent of the liability was then considered the same, which we should also infer from other parts of the case.

"Calye's case, 8 Coke, 32 a, which is regarded as the leading case upon this subject among the early reports, certainly decides nothing more than that the host is not liable for the horse of his guest, if put in the pasture by direction of the owner, and there stolen; but he probably would be, if put in the barn, for it would then be the folly and neglect of the hostler not to lock the barn. The numerous dicta in this case, as in most of the cases in Lord Coke's Reports, go far beyond the case, and embody the leading principles of a brief treatise upon the subject. And these dicta have been regarded as authority to some extent. But even that will not justify the present action. 'There ought to be a default in the innholder or his servants' (or may we not add guests?). But in the present case, there is no pretense of any such default.

"White's case, 2 Dyer, 158 b, is where the house was full, and the guest undertook to shift for himself, being admitted as matter of favor, and upon that condition, and the innkeeper was held not liable, even for robbery committed in the house, which he *primâ facie* clearly would be in ordinary cases, and ultimately, unless he could show that no degree of diligence, on his part, which it was reasonable to require, could have prevented the robbery. The case of Saunders v. Spencer, 3 Dyer, 226, decides, that goods, which the guest declines to have locked up in a place pointed out to him, are at his own risk.

"It is certain, that Sir William Jones, in his treatise upon the liabilities of bailees, lays down no such extreme liability on the part of innholders as is here claimed. He is liable, says this writer, if the goods of a guest be stolen from his premises "by any person whatever." And he is liable for robbery, even, if committed by his servants or guests, but not if he take ordinary care, or the force were truly irresistible. This is the import of the rule laid down by Sir William Jones. And Mr. Justice Story adopts almost precisely the same view, in his valuable treatise upon bailments. The innkeeper is bound to the extremest degree of diligence, which any prudent man would be expected to resort to in defending his own goods, and is absolutely responsible for loss by his own servants or guests, and, *primâ facie*, for all losses.

"Chancellor Kent (2 Kent, 592) lays down much the same rule. He says, the liability does not extend to loss occasioned by inevitable casualty, or by superior force, as robbery. A more extreme case of superior force than the present is scarcely supposable, or one more clearly within the reason of the rule, requiring extreme strictness in the care and responsibility of innholders.

"The American cases referred to in the argument certainly do not decide

bility of innkeepers upon precisely the same ground with that of common carriers, we still incline to the opinion, that all which can properly be required of them is to ex-

what is necessary to maintain this action. *Mason v. Thompson*, 9 Pick. 280, involved no question of difficulty, except whether the defendant was liable at all as a common innholder. The goods, being the plaintiff's harness, were confessedly lost, and nothing appeared, but that they were lost by the neglect of the defendant's servants. As a common innholder, this imposed the burden upon him to show that the loss occurred without his fault. This he did not attempt. It being settled, that the defendant was liable as a common innholder, although the plaintiff was not at the time a lodger in the plaintiff's house, there remained no farther doubt in the case.

"So, too, in *Piper v. Manny*, 21 Wend. 282, the goods were stolen from the plaintiff's load, which was left in the open yard by direction of the defendant's servants, and the defendant was held liable upon the most obvious principles of the law applicable to the subject. It is true, in both these cases, the opinion is broadly declared, that the liability of an innholder and a common carrier is the same. But the cases called for no such opinion, and no authority is cited for the opinion; and it is by no means certain, that those judges would have so held, if it had been necessary to turn the case upon that naked question. No authority whatever is cited in the former case except by the reporter, who refers to *Richmond v. Smith*, 9 B. & C. 9; and that was only the case of goods stolen from the inn, and it was held, the innkeeper was *primâ facie* liable. And the judges here say, 'that in this respect (that is, where goods are stolen), the situation of the landlord is precisely similar to that of a carrier.'

"But we find, that, when the very question comes before the English courts, as it did in *Dawson v. Chamney*, 5 Ad. & Ellis (N. S.) 164, (48 E. C. L. 164), for the first time, so far as I can find, it was found necessary to put very essential qualifications upon the language of the judges, as reported in the last case referred to. The doctrine of this case, as expressed in the note, is 'When chattels have been deposited in a public inn, and there lost or injured, the *primâ facie* presumption is, that the loss or damage was occasioned by the negligence of the innkeeper or his servants. But this presumption may be rebutted; and if the jury find in favor of the innkeeper, as to negligence, he is entitled to succeed on a plea of not guilty. This rule, it is there shown very clearly, is founded upon the ancient common-law liability of innkeepers, as set forth in the writ, taken from the *Registrum Brevium*, and found also in Fitzherbert's N. B., 94 B. Of the guests, it is said there, their goods being in those inns, without subtraction to keep night and day, are bound, so that for default of them, the innkeepers or their servants, damage may not come in any manner to such guests.'

"It is, perhaps, scarcely necessary to pursue this subject farther. It is certain no well-considered case has held the innkeeper liable in circumstances like the present. And no principle of reason, or policy, or justice, requires, we think, any such result, and the English law is certainly settled otherwise. We entertain no doubt, therefore, that the defendant is fairly entitled to have the judgment, which he obtained in the court below, affirmed."

onerate themselves by positive and satisfactory proof from all imputation of negligence, or fault in regard to the loss, and the exoneration must extend as well to their servants and guests as to themselves. But the difference is so slight in the two rules, as we have before attempted to show in regard to the different degree of responsibility defined, as attaching to common carriers of goods and of passengers;⁵ after it is shown that there was no agency or default on the part of the innkeeper, his servants, and all the inmates⁶ of his house and dependencies, contributing in the slightest degree to the injury, that little more remains except inevitable accident and superior force; or at least so little, that it ceases to be of much practical importance.

§ 598. We shall now state a few of the circumstances of particular cases illustrating the responsibility of innkeepers. It seems to be the fair result of all the cases, that the innkeeper is responsible for all the property of every kind, which the traveller finds it convenient to have about him as a traveller. The amount of money will thus,

⁵ *Ante*, pt. iii. ch. xxiii. In *Howth v. Franklin*, 20 Texas, 798, it is said an innkeeper may excuse the loss of articles intrusted to him, by proof of extreme diligence, but not otherwise. And in *Packard v. Northcraft*, 2 Met. (Ky.) 439, it is thus stated: They are bound by law to take not merely ordinary care, but uncommon care of the baggage of their guests. And in *Laird v. Eichold*, 10 Ind. 212, it is stated thus: He is only *primâ facie* liable for loss to his guest; a presumption to be repelled by proof that neither he nor his servants caused the loss by negligence. And in *Fowler v. Dorlon*, 24 Barb. 384, the rule is stated much in the same terms, adding, it is enough to exonerate the innkeeper if the guest has by his own neglect exposed his goods to peril, and that it was proper to submit to the jury how far the guest was guilty of improper conduct in concealing the fact that his valise contained money, and treating it as mere baggage. And in *Johnson v. Richardson*, 17 Ill. 302, it is said that innkeepers are bound to keep the goods of their guests in safety, and in case of loss or injury the burden of proof is upon them to show that it occurred without their fault. s. p. *Metcalf v. Hess*, 14 id. 129.

But in *Sibley v. Aldrich*, 33 N. H. 553, it was held, the innkeeper is responsible to the full extent of common carriers. And the same rule is declared in *Maten v. Brown*, 1 Cal. 221. And the same rule is maintained in *Pinkerton v. Woodward*, 33 Cal. 557.

⁶ *Towson v. The Havre de Grace Bank*, 6 Harr. & Johnson, 47.

it must be very apparent, vary exceedingly in different cases. In ordinary cases the traveller will not require any amount of money beyond his probable expenses and a reserve sufficient to meet those contingencies which a prudent man might be expected to provide against, although he might not expect them; such as, longer stay from detention of business, or ill health, and such accidental occurrences as often arise to prolong one's absence from home, or to enhance expenses, more or less. This in one case is thus stated. The innkeeper will be responsible for the necessary baggage of the traveller, his watch and personal apparel, and money which he has about him for his personal use, when stolen, notwithstanding a regulation of the inn requiring travellers to deposit certain articles of value in the safe at the office.⁷

⁷ *Pope v. Hall*, 14 La. Ann. 324; *s. p.*, *Profflet v. Hall*, *id.* 524. This case seems to recognize the distinction between those effects of a traveller, which are not immediately and constantly requisite for his comfort, and which the law requires that he should deposit with the innkeeper or his servants, in order to hold him responsible for their loss, and those which are essential to his personal convenience, and which it is necessary to have constantly about him. This seems to point to a distinction between depositing a small amount of money in the safe, which the traveller might desire to have constantly about him, and a much larger amount, which he might only desire to have on his person, in some particular emergency. In the latter case it might be regarded as want of proper care, for a traveller to carry hundreds or thousands of dollars of money about his person, when a much less sum he might with entire propriety decline to deposit in a safe. And it is here said, as in numerous other cases, that if the traveller contributes by his own act or neglect to the loss, he cannot hold the innkeeper responsible. And whether that be the fact, must ordinarily be determined by the jury from a consideration of all the facts and circumstances of the case. Thus in *Johnson v. Richardson*, 17 Ill. 302, it is said, travellers are not bound to deposit their money in a safe at an inn, although they may know one is provided for that purpose. But under the New York statute which requires guests to place money and other valuables of that character in a safe, if provided and notified to the guest, it is held that the innkeeper having complied with the statute is not responsible for any amount of money, even for expenses, unless placed in the safe. *Bondetron v. French*, 44 Barb. 31; *Hyatt v. Taylor*, 51 *id.* 632. While out of the safe they are at the sole risk of the guest. *Ib.* And even where the guest took a package of jewelry to the office and offered it to the clerk to put in the safe, without stating its contents, and the clerk told the guest it would be just as safe at his room and to take it there, which he did and it was stolen, the inn-

§ 599. As a general rule the innkeeper's responsibility for the goods of his guests extends to every part of the house, into which it is usual for such property to be taken. And this general rule can only be restricted or qualified, by the innkeeper showing in some way that the guest should have placed his property in a different place from what he did, in order to secure his liability.⁸ There has

keeper was held not responsible by reason of the omission to declare the contents. *Ib.* But an innkeeper is not liable to indictment for keeping a faro bank, because one who rented a room in his house, for the purpose of being used as a bedroom, and over which the innkeeper had no control, had by the lessee, without his knowledge or suspicion, been put to that use. *Commonwealth v. Watson*, 2 Duv. 408. In the recent case of *Pinkerton v. Woodward*, 33 Cal. 557, this question is very thoroughly examined and learnedly discussed both by court and counsel. In regard to the responsibility of the innkeeper for his guests' property, it was declared, that it extends equally to such as the guests have with them, in their immediate possession, at the moment of arrival at the inn, and that which subsequently arrives at the inn, and equally to property acquired by the guests, subsequently to arrival at the inn; and also that where by general notice the guests were requested not to leave money or articles of value in their rooms, but to deposit them for safe keeping in the safe at the office, and a deposit of money and gold dust was made at the office by a guest, which was placed in the safe, this was held to be presumptively a deposit made and received as guest, and that the innkeeper was responsible, as such, for its security. As to the amount and kind of property for which the innkeeper may be held responsible, as such, it is here said that where, under the general notice above by the innkeeper, that otherwise he would not be responsible for such property, the guest had deposited, as above, \$4523.07 in gold dust, and the same was received and placed in the safe without objection by the innkeeper, and the same was subsequently stolen, he could not then raise any question in regard to the extent of his responsibility as innkeeper for the property. Mr. Justice *Rhodes* here sums up the cases, where innkeepers have been held responsible for property beyond the present necessities of the guest, thus: "In *Clute v. Wiggins*, 14 Johns. 175, the guest recovered for certain bags of wheat and barley. In *Piper v. Manning*, 21 Wendell, 282, the recovery was for a tub of butter. In *Sneider v. Griss*, 1 Yeates, 34, the innkeeper was held liable for two hundred and thirty Spanish milled dollars. In *Hulet v. Swift*, 33 N. Y. 571, the plaintiff recovered the value of his horses, wagon, and a load of buckskin goods. In *Towson v. Havre de Grace Bank*, 6 Har. & Johns. 47, the property in controversy was one thousand dollars in bank bills. In *Mateer v. Brown*, 1 Cal. 221, the amount deposited was five thousand five hundred dollars in gold dust." And in *Purvis v. Coleman*, 21 N. Y. 111, the innkeeper was held not responsible for five hundred English sovereigns, lost while the plaintiff was his guest. But this case is affected by the statute.

⁸ *Epps v. Hinds*, 27 Miss. 657. In this case the traveller directed to have his trunk, which contained money, carried to his room, which the innkeeper had

been considerable controversy in the courts, under what precise circumstances a traveller is bound to deposit money in the safe at an inn, in order to hold the keeper responsible. It seems to be the result of all the cases, that if the guest is made aware, that the innkeeper has a safe for the deposit of valuables, where he expects guests to deposit money or other property of any large amount or value, that he will be bound to conform to such requirement where the amount or value is considerable. That was so held under the New York statute. It was also so held here, where the guest left \$2000, in gold, in a room in a New York hotel. It was said in one case,⁹ that in such cases, the guest who omits to put his money or other valuables in the safe, where he has express notice to do so, assumes the risk of any loss, not occurring from the actual fault or negligence of the innkeeper or his servants. But where in such case the baggage has been prepared for leaving the hotel, and placed under the care of the innkeeper's servants for that purpose, the innkeeper's responsibility is full and complete, and if loss occur he is responsible.¹⁰ And where the guest paid his bill in the morning, and thereby became entitled to the use of the room for the day, and left his trunk there, with twenty-five cents for portage, the clerk agreeing, at four o'clock, to send the trunk to a steamer, it was held the innkeeper's responsibility continued until the trunk was placed on board the steamer; and that the consideration for this responsibility was the increased custom expected to arise from extending such conveniences to travellers.¹¹

shown him for the night, and it being stolen, the innkeeper was held responsible, the traveller having only conformed to the usual practice.

It was also held in this case, that as the money stolen was furnished the son, he being the guest, by the father, for his expenses, the suit might well be in the father's name.

⁹ *Purviss v. Coleman*, 21 N. Y. 111, three judges dissenting; s. c. and s. p., 1 Bosw. 321.

¹⁰ *Stanton v. Leland*, 4 E. D. Smith, 88.

¹¹ *Giles v. Fauntleroy*, 13 Md. 126.

§ 600. It does not seem to be incumbent upon the guest to deposit his goods in any particular place, or to give them in charge of any particular person, except to do that in each particular case which is prudent and calculated to render them ordinarily safe. For this purpose they must be put into the keeping of the innkeeper, or of his servant occupied in the particular department. Thus, the guest must leave his horse, carriage, etc., in charge of the hostler, and his trunk, coat, valise, and the like, in charge of the clerk, or other person having the superintendence of such matters about the office. But if a guest should place a bag of money in the keeping of the hostler or the chambermaid, the innkeeper would not be responsible for its safety.

§ 601. But it has been held, that the innkeeper is responsible for goods left in the lobby or hall of the inn.¹² And in another case it was held, that the omission of the guest to leave valuable articles with the innkeeper, or to fasten his door on retiring to rest, is not necessarily such

¹² *Candy v. Spencer*, 3 F. & F. 306, before *Martin*, B. Thus it has been held the innkeeper is chargeable if the goods are delivered at the usual place for such goods at the inn, although not strictly within the inn. Thus if wheat in a sleigh is put into the outer house, appurtenant to the inn and used for such purposes and is stolen, the innkeeper will be responsible. *Story on Bailm.*, § 480; *Clute v. Wiggins*, 14 Johns. 175. But where a loaded wagon was left under an open shed, near the highway, and no request for the innkeeper to take charge of it, and goods were stolen from it during the night, the innkeeper was held not responsible, notwithstanding it was usual to leave loaded wagons in that place. *Albin v. Presby*, 8 N. H. 508. And so if a horse is delivered to the hostler at the inn, to be fed, and the hostler takes off the saddle and bridle, and deposits them in a barn belonging to the inn, and they are stolen, the innkeeper will be held responsible. *Hallenbake v. Fish*, 8 Wend. 547. So where the innkeeper receives a horse and gig, and the owner, as a guest, putting the horse in the barn, and the gig among other carriages in the open street, it being the day of a fair, and the gig was stolen, he was held responsible. *Jones v. Tyler*, 1 Ad. & Ellis, 522. And in *Norcross v. Norcross*, 53 Me. 163, it is said the liability of the innkeeper attaches for goods, when they are brought within the inn, or otherwise placed within the custody of the innkeeper in some customary and usual manner; as where the guest, in the absence of the landlord and his servants, hangs up his overcoat in the place in the inn allotted for the purpose, it is *infra hospitium*.

negligence as to prevent his recovery for their loss. And even 'notice from the innkeeper to the guest that he will not hold himself responsible, if such precautions are neglected, will not relieve the innkeeper from responsibility. He is bound to keep watch and ward, in the old English phrase, to maintain security in his house, for all the property of travellers under his protection. And it was even declared here,¹³ that an innkeeper, though guilty of no negligence, but even diligent, is liable for the loss or injury of the goods of his guest, not arising from the negligence of the guest, the act of God, or the Queen's enemies. In all these cases it is a question of fact for the jury, whether the loss or injury was in any sense attributable directly to the want of care and prudence on the part of the guest. If so, the cases all agree no action can be maintained against the landlord.¹⁴

§ 602. In one case¹⁵ it is said the innkeeper will be

¹³ *Morgan v. Rarey*, 6 Hurl. & Norm. 265; s. c., 2 F. & F. 283.

¹⁴ *Fowler v. Dorlon*, 24 Barb. 384; *Profiel v. Hall*, 14 La. Ann. 524; *Armistead v. Wilde*, 17 Q. B. 261. In the case of *Armistead v. Wilde*, the facts were that the plaintiff, on the evening of the night of the theft, and on several previous occasions, opened his driving-box, and counted the bank-notes kept in it, in the presence of persons in the commercial room, and the box was so insecurely fastened that it might be opened without a key. It was held the jury were justified in finding the plaintiff guilty of gross negligence, although it was the custom of travellers to leave their driving-boxes in the commercial room during the night. It was considered the duty of the innkeeper to see that the goods were removed to a safe place, or to make the guest understand that if they remained there he could not be responsible for their safety. *Burgess v. Clements*, 4 Mau. & S. 306. But in another case where the guest showed his money in the commercial room, went to bed and slept with his bed-room door open, so that a person outside could see his watch and money lying on the table, and late at night the servant having charge let in a stranger who two hours afterwards left the inn secretly, having stolen the watch and money, it was held the goods remained under the protection of the inn, so as to make the keeper liable for breach of duty, unless the negligence of the guest had occasioned the loss, and it would not have happened but for his want of prudence. But where there is evidence of some neglect on the part of the guest, but also that the property, a watch, was probably stolen by a servant of the innkeeper, it was held the jury having found for plaintiff, the verdict must stand on the presumption that it was found the servant stole the property. *Huntington v. Drake*, 24 Ind. 347.

¹⁵ *Packard v. Northcraft*, 2 Met. (Ky.) 439. In *Richmond v. Smith*, 8 B. & C.

exonerated, where the guest has taken upon himself exclusively the custody of his own goods. But this should very clearly appear, in order to exonerate the innkeeper. No such result should be arrived at, except upon the clearest evidence, that such was the unquestionable intent and understanding, both of the guest and of the landlord. In this case¹⁵ it was held that a request by the guest that his baggage should remain in some particular place in the inn, not in his exclusive possession, but under the supervision of the innkeeper, will not exonerate the latter. And even where goods are left in the common room by the guest, the landlord will be held responsible, unless he has given the guest distinct notice that he will not be responsible if they are left there. In such cases it will ordinarily be regarded as the duty of the guest to comply with the reasonable request of the landlord. But where the landlord, as his guest was about to retire for the night, said to him, that he had better take his valise to his room, and he replied that it was not necessary, it would be safe in the bar-room, where it was allowed to remain, and could not be found the next morning, the innkeeper was held responsible¹⁵ and very justly, since it was for the landlord to judge, whether it would be safe there, and if not it was his duty to place it where it would be safe. He had no right to trust to the opinion of the guest, who had no proper or adequate means of knowing whether it would be safe, and might properly trust to his landlord. But where the innkeeper notifies his guest to take certain precautions in

9, it was held, where the guest desired to have his baggage taken into the commercial room, to which he resorted, and from whence it was stolen, that the innkeeper was responsible, notwithstanding he proved that, according to the usual custom of his house, the baggage would have been deposited in the guest's bedroom and not in the commercial room if no order had been given respecting it. And the innkeeper is equally responsible for the goods, if placed in the guest's private room, of which he has the key, and they are lost. *Ib.* If one puts his horse at an inn, the keeper is impliedly bound to take care of the gig and harness brought with the horse, without special request. *Jones v. Tyler*, 1 Ad. & Ellis. 522.

order to secure safety, and the guest omits them, without the knowledge of the landlord, it seems questionable how far he can hold him responsible for the consequences of such omission. But it is clear that a guest at an inn is not bound to keep his room constantly locked in order to entitle him to recover for the loss of his goods.¹⁶

§ 603. The rule is much the same in regard to exoneration of the innkeeper by the interference of the guest that it is in regard to that of the owner of the goods in the case of common carriers, either of goods or passengers.¹⁷ It will not exonerate, except so far as it excludes the control, or lulls the watchfulness, of the innkeeper. It is the business of the innkeeper as of carriers, to know and to direct what shall be done in order to secure safety, and not to trust to the advice or opinion of his guests, unless where the guest, after being informed of the insecurity of his property in a particular place, and that the innkeeper will not hold himself responsible if it remain there, either obstinately or negligently suffers it to remain.

§ 604. There has been considerable discussion, as to the extent to which the innkeeper's responsibility reaches in regard to the amount and kind of property. There are many cases which seem to assume, that the responsibility is limited, as in the case of common carriers for baggage, to such articles of wearing apparel and personal use and conveniences as travellers ordinarily carry with them. Thus in one case¹⁸ it was decided, that a Colt's pistol, and a dozen silver teaspoons, are not properly part of a traveller's baggage. And in another case¹⁹ in this same State, it was decided that the innkeeper is only responsible for the guest's baggage, and that that term includes articles for use and convenience on the journey; but not merchandise, and other valuables,

¹⁶ *Buddenburgh v. Benner*, 1 Hilton (N. Y. C. P.), 84.

¹⁷ *Ante*, §§ 74, 76.

¹⁸ *Giles v. Fauntleroy*, 13 Md. 126.

¹⁹ *Pettigrew v. Barnum*, 11 Md. 434.

such as silver knives and forks, and spoons. And in New York²⁰ it was held that a watch, pencil-case, and twenty-five dollars in money, lost by a guest at a hotel, were not to be regarded as baggage, within the meaning of the New York statute.²¹ But where the guest had been put into a room with a fellow lodger, against his remonstrances; whereby the precautions of locking his door, etc., required by the statute, became impracticable or unavailing, the innkeeper was held responsible, and that his negligence was sufficiently shown, by the loss of the goods from the room, under the circumstances. There are some other cases which take a similar view.

§ 605. But it seems to us the true rule upon this subject is that before stated: that the responsibility of the innkeeper extends to all the money and goods, which the exigencies of the traveller's business require him to carry with him, the traveller, where the sum is of considerable amount, being bound to use the ordinary precautions provided at the inn for such occurrences. Any other rule must be attended with very serious inconveniences in many cases, and affording but partial security in many very important emergencies. But the rule is susceptible of abuse on the part of the guest; and where the amount of money or other valuables is very considerable, it should very clearly appear that the guest made no indiscreet or improper exposure of his money and other valuables, and that he did not omit, on reasonable notice or request, to use all proper precautions for the security of his property. The point seems to us to be placed upon very fair and just grounds by Mr. Justice *Fletcher* in *Berkshire Woolen Co., v. Proctor*.²² The general proposition, that the innkeeper is

²⁰ *Gile v. Libby*, 36 Barb. 70.

²¹ Act of 1855, by which guests at hotels are required to lock or bolt their doors, to secure the responsibility of the keepers.

²² 7 Cush. 417, 427. The learned judge here said: "The responsibility of innkeepers for the safety of the goods and chattels and money of their guests is founded on the great principle of public utility, and is not restricted to any par-

responsible for the money of his guest without limitation, except by the necessities or convenience of his guests, seems to be held in other cases.²³ The consideration for the responsibility imposed upon the innkeeper being the profit which he derives from the transaction,²⁴ he could not be held to this extreme degree of responsibility for mere dead things, unless they were placed in his custody as part of a transaction from which he derived profit.²⁴

ticular or limited amount of goods or money. The law on this subject is very clearly and succinctly stated by Chancellor *Kent*, as follows: 'The responsibility of the innkeeper extends to all his servants and domestics, and to all the movable goods and chattels and moneys of his guest, which are placed within the inn.' 2 *Kent Comm.* 593. The liability of an innkeeper for the loss of the goods of his guest being founded, both by the civil and common law, upon the principle of public utility and the safety and security of the guest, there can be no distinction, in this respect, between the goods and money. *Kent v. Shuckard*, 2 B. & Ad. 803; *Armistead v. White*, 6 Eng. Law & Eq., 349; s. c., *nom. Armistead v. Wilde*, 17 Q. B. 261; *Quinton v. Courtney*, 1 Haywood, 40. The principle for which the defendants contend, that innkeepers are liable for such sums only, as are necessary and designed for the ordinary travelling expenses of the guest, is unsupported by authority, and wholly inconsistent with the principle upon which the liability of an innkeeper rests. The reasoning, both of the civil and common law, by which the doctrine of the liability of innkeepers, without proof of fraud or negligence, is maintained, is, that travellers are obliged to rely almost entirely on the good faith of innkeepers; that it would be almost impossible for them, in any given case, to make out proof of fraud or negligence in the landlord; and that therefore the public good and the safety of travellers require that innholders should be held responsible for the safe keeping of the goods of the guests. This reasoning maintains the liability of the innkeeper for the money of the guest, quite as strongly as his liability for goods and chattels, and it would be clearly inconsistent with the general principle upon which the liability is founded, to hold that the defendants were not responsible for the money lost in the present case. 2 *Kent Comm.* 592 to 594; *Story on Bailm.* §§ 478, 481; *Sneider v. Geiss*, 1 *Yeates*, 35."

²³ *Kent v. Shuckard*, 2 B. & Adol. 803.

²⁴ *Lane v. Cotton*, 12 Mod. 483, 487.

CHAPTER V.

THE NATURE AND EXTENT OF THE INNHOLDER'S LIEN UPON THE
GOODS AND EFFECTS OF THE GUEST IN HIS CUSTODY.

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| <p>§ 606. <i>The innkeeper has a lien upon all the goods of the guest for all expenses incurred.</i></p> <p>§ 607. <i>And this lien will not be affected by any defect of title in the guest.</i></p> <p>§ 608. <i>But a stable-keeper, even in connection with an inn, who receives a horse at livery, has no lien for his keep or for any expense incurred by the owner. An agister of horses has no lien upon them for expense incurred, and is not responsible except for want of ordinary care. The innkeeper has no lien upon the effects of his ordi-</i></p> | <p><i>nary boarders for their expenses incurred.</i></p> <p>§ 609. <i>The innkeeper has a lien upon the traveller's horse put in his stable, although he lodge elsewhere. So also upon all property the guest leaves in his possession, for all expense incurred.</i></p> <p>§ 610. <i>Distinction stated between the case of an innkeeper and livery stable keeper as to lien.</i></p> <p>§ 611. <i>It will make no difference that the guest is an infant.</i></p> |
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§ 606. ONE of the distinctive characteristics of the office and duty of innholders is, that they have a lien upon all the effects of the guest in their custody, for the owner's bill; and this will extend to his horse, harness, and carriage, for the keep of his horse and probably for the whole sum due.¹ It was said in an early English case,² by *Eyres, J.*: "They (innkeepers) may detain the person of the guest who eats." And this doctrine has been often since repeated, without much examination or consideration, probably. But when the point came to be seriously urged and carefully reconsidered in a comparatively recent case,³ that extreme view was rejected, with some expressions of disgust, on the part of the learned judge,

¹ Story on Bailm. § 476.

² *Newton v. Trigg*, 1 Shower, 269.

³ *Sunbolf v. Alford*, 3 M. & W. 248.

Lord *Abinger*, Ch. B., that any such proposition should be found in the books. "I would be sorry," said his lordship, "to have it thought I entertain any doubt in this case, or required any authority to support the judgment I propose to give," against the validity of any lien upon the person of the guest in favor of the innkeeper.

§ 607. But there can be no question of the innkeeper's lien to the extent already stated; and this is illustrated by numerous cases in the books. And this lien, it has been held, will be perfectly valid, although the goods be brought to the inn by one who is not the owner, and had no right to use, or bring them to the hotel or inn.⁴ This was for the storage and care of a carriage brought to the inn by the guest, but which proved to be the property of another. The court held the innkeeper was not bound to inquire whether the carriage really belonged to his guest; but if he receive it *bonâ fide* he may retain it against the real owner, however the guest may have obtained possession of it. But it is here doubted whether he have a lien upon the carriage for the whole bill of the guest, or only for the expense incurred in regard to the carriage.

§ 608. It seems to be entirely well settled, that if an innkeeper receive horses to stand at livery in his stable, the circumstance of the owner, at a subsequent time, taking occasional refreshments at the inn, or sending a friend to be lodged there, will not entitle the innkeeper to a lien in respect to any part of his demand.⁵ And an agister of horses is not responsible for anything that may befall

⁴ *Turrill v. Crawley*, 13 Q. B. 197; *Sneed v. Watkins*, 1 C. B. (N. S.) 267. This was the case of a witness who attended a trial on behalf of another, and brought with him the letter-book belonging to the party who summoned him as a witness; and left it in the possession of the innkeeper, without paying his bill. The court held the owner could not reclaim it without paying the charges of the witness at the inn. But it has been subsequently held, that if the innkeeper knew, when the goods were brought to the inn, that they did not belong to his guest, he acquires no lien upon them, as against the real owner. *Broadwood v. Ganara*, 10 Exch. 417; 28 Eng. L. & Eq. 443; *post*, n. 10.

⁵ *Smith v. Dearlove*, 6 C. B., 132.

them, unless through his want of ordinary care;⁶ and he has no lien for his expenses incurred in respect of them. And the innkeeper has no lien upon the goods of his regular boarders, such persons as reside permanently in the place and board at the inn, for definite times and for an agreed price.⁷

§ 609. It does not seem to be essential to the innkeeper's lien for the keep of the horses of a traveller, that the owner should also be a guest at the inn. The lien will equally attach although he put up at a different place.⁸ But where the innkeeper acts in good faith, having no reason to suppose the goods are not the property of his guest, he will have a lien upon all the property brought to the inn and placed under his charge, for all the expense incurred by the guest, not only in respect of the particular thing, but for all purposes; or at least this seems to be the more reasonable view, and the better opinion.⁹

§ 610. But it is clear that a mere livery stable-keeper has no lien upon horses placed under his care.¹⁰ The distinction seems to be between the innkeeper who keeps a stable for the accommodation of mere travellers, and is consequently bound to receive all that come, and can have no means of knowing, at the time the horse and carriage is left with him, whether the owner also purposes to remain as a guest; and that of a mere livery stable-keeper, who although he may sometimes take horses of travellers to keep for longer or shorter periods, does not hold himself out to take all which come, and may either reject or require special contracts for lien whenever he deems it prudent. The subject is certainly very fairly and fully

⁶ *Broadwater v. Blot*, Holt, 547.

⁷ *Ewart v. Stark*, 8 Rich. 423.

⁸ *Peet v. M'Graw*, 25 Wend. 653; *Mason v. Thompson*, 9 Pick. 280.

⁹ *Story, Bailm.*, § 476; *Sunbolf v. Alford*, 3 M. & W. 248. This question is very fully discussed by *Bronson, J.*, in *Grinnell v. Cook*, 3 Hill, 485; and the authorities are very extensively reviewed here.

¹⁰ *Jackson v. Cummins*, 5 M. & W. 342; *Grinnell v. Cook*, *supra*, and cases cited.

presented in *Grinnell v. Cook*,⁹ by Mr. Justice *Bronson*, and we should scarcely expect to add much to what will there be found, in regard to lien in favor of the keepers or trainers of horses under different circumstances.

§ 611. It has recently been decided, that the lien of an innkeeper for the payment of the bill incurred by his guest, is not affected by the fact that the guest is an infant. And the bill may embrace money furnished the infant and by him expended in the procurement of necessities.¹¹

¹¹ *Watson v. Cross*, 2 Duvall, 147.

CHAPTER VI.

THE FORM OF ACTION AND IN WHOSE NAME BROUGHT, AND THE
NATURE OF THE EVIDENCE.

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| <p>§ 612. <i>The action may be brought in the name of the person making the contract, or of him on whose behalf the contract is made.</i></p> <p>§ 613. <i>It may be either in assumpsit, on the</i></p> | <p><i>contract, or in case upon the duty in law, implied from the relation.</i></p> <p>§ 614. <i>The extent and character of the evidence required either in support or defense of the action.</i></p> |
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§ 612. THE action may, as in other cases, be brought in the name of the party in interest, as the owner of the goods, or in the name of the party with whom the contract is made, he being the bailor, and it is not in the power of the innkeeper to take any exception on that ground, provided the action is brought in the name of a party, so entitled to represent the rights of the party in interest, that a recovery of judgment, will with satisfaction thereof at all events, merge the cause of action or be a bar to any future action in the name of another party. And it seems that such a cause of action will survive against the executor or administrator of an innkeeper who has been guilty of defect of duty in regard to his guests.¹

§ 613. And there can be no question that, as in other cases of bailment, the remedy for breach of duty may be in contract or tort, counting in one case specifically upon the breach of the implied contract resulting from the relation of guest and innkeeper, and in the other upon the breach of duty resulting from that relation, as matter *ex delicto*.²

¹ *Morgan v. Ravey*, 6 Hurl. & Nor. 265.

² 1 Chit. Pleading, pp. 96, 140, and cases cited.

§ 614. It is scarcely necessary to state, after what has been said, that the guest will always be able to make a *prima facie* case against the innkeeper by showing the loss or injury of the goods, while he was in the capacity of guest at the inn.³ It is then incumbent upon the innkeeper to show that he was guilty of no negligence, and that the goods were lost or injured entirely without his fault.⁴ To this end it will ordinarily be incumbent upon the innkeeper to satisfy the jury in what mode the loss or damage did occur.⁵ Innkeepers have always been held responsible for losses by theft by persons within the house, or coming in by the permission of the innkeeper or his servants.⁶ But unless the innkeeper is held liable for all loss or damage not caused by the negligence of the guest, the act of God or irresistible force, he will not be held responsible for robberies by a mob. But if the same extreme responsibility is here applied as in the case of common carriers of goods, he must not only make good losses resulting from riots and robberies, but also from fire, unless by lightning.⁷ In regard to losses from burglarious entries into the inn, there might always be some presumption of want of due care, either in properly fastening the house or keeping proper watch over it during the night. As we have before stated, the innkeeper may always exonerate himself by showing that the loss or damage occurred to any extent through the agency or want of proper care and prudence on the part of the guest, his servants, or persons brought to the house by him.⁸

³ Bennett v. Mellor, 5 T. R. 273; Hill v. Owen, 5 Blackf. 323.

⁴ McDaniels v. Robinson, 26 Vt. 337.

⁵ Merritt v. Claghorn, 23 Vt. 177; McDaniels v. Robinson, *supra*.

⁶ Story on Bailm., § 470; 2 Kent, 592; Epps v. Hinds, 27 Miss. 657.

⁷ Story on Bailm., § 472, and cases cited. See also McDaniels v. Robinson, 26 Vt. 316, 338, where the point is considerably discussed.

⁸ Cayle's case, 8 Co. 32.



PART VI.



THE LAW OF BAILMENTS WHERE NO EXTREME
DEGREE OF RESPONSIBILITY IS REQUIRED.

PART VI.

THE LAW OF BAILMENTS WHERE NO EXTREME DEGREE OF RESPONSIBILITY IS REQUIRED.

CHAPTER I.

INTRODUCTION.

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| § 615. <i>The scope of the work, and the reasons for rendering it a complete treatise upon the law of bailments.</i> | § 618. <i>Gratuitous bailments rest on personal confidence.</i> |
| § 616. <i>Reasons for confining the treatise to the limits of the common law.</i> | § 619. <i>Definition expanded.</i> |
| § 617. <i>Definitions connected with the subject.</i> | § 620. <i>Same continued.</i> |
| | § 621. <i>Same.</i> |

§ 615. It seems suitable here, after having considered the several species of bailment, where extraordinary diligence is required, and extreme responsibility imposed, to give a brief view of the law upon all the different kinds of bailment. Most of these, which are of much practical importance in the law, such as warehousemen, wharfingers, etc., have been incidentally discussed, in connection with the duty of carriers. But there remain some other cases of bailment, where controversy in the courts is not uncommon, such as pawns or pledges, hiring and letting of personal property, and some few others.

§ 616. We shall content ourselves, by giving the English and American law upon the subject, and by bringing the decisions, as nearly as practicable, down to the present time, without devoting much space to the discussion of

either the Roman Civil Law, or that of the Continental countries in Europe, our purpose being to afford the profession a reliable guide to the present state of the English common law, as it obtains in this country at the present time, upon the several topics discussed. We shall spend less time upon those departments of the law of bailments, where controversies seldom arise, such as deposits, mandates, etc., since they are of less importance, and there is consequently less in the books in regard to those topics. But we by no means intend to intimate, that because we omit the discussion of the law of other periods, and other countries, and only present the law of England, and of our own country, our treatise will be any the less reliable, or instructive, either to the student or to the profession. We regard that feature an excellence rather than a defect. We shall be glad to see the time, when all this merely antiquarian research and disquisition upon the law of other countries, shall be effectually eliminated from our legal treatises, and when we can be allowed to come, at once, to the consideration of the common law of England, from its origin to the present day, with existing statutory modifications, and resort to the civil and continental law-writers, for incidental illustrations for aid rather than ornament. A law-book is not only no more useful, for being largely made up of extracts from learned authors in the Latin or French, Spanish or Portuguese, although it may appear far more learned; but it is in fact far less useful to those who have no time to devote to such mere scholarly comments or scholastic refinements. We do not object to an occasional resort to the treasury of the civil law, and the continental commentators upon the *corpus juris civilis*, for the aid of its analogies; but we must be allowed to depart from the practice, far too common hitherto upon some topics, of making the foreign law the basis of our own treatises. The English writers seldom do this, to any large extent; and it seems to us we can now fairly afford,

both in this country and in England, to regard the English common law, with the ameliorations it has received from the courts of chancery, a field wide enough to employ all the learning or leisure, which we shall be able to expend in its culture. We know it is a very cheap way to give a treatise upon any department of the common law an air of learning and wide research; to which it is not fairly entitled, to intersperse its pages with extended extracts from the works of the continental jurists. But to those who have leisure this is not needful; they will prefer to read these authors for themselves; and to those who have not time to devote to merely elegant pursuits in the learning of the profession, it is an expense of time and money, not adequately compensated by any advantage to be derived from it. To double the volume and by consequence the expense, of a law-book, in this mode, is imposing a needless and a very onerous burden upon the time and means of the profession, in order to minister slight gratification to the aspirations of the author for present veneration and respect, or future remembrance. The author of the few following pages will be content, if he can hope to lighten, in any sense, either of lessening their burden or of increasing their illumination, the labors of his professional brethren, or of those now about to enter their honored ranks, without preferring any claims to special gratitude or remembrance. But he trusts his vindication of the wisdom and sufficiency of the treasury of the English common law for all exigencies, either of principle or illustration, will not expose him to the imputation of vandalism, for he here protests in all humility and sincerity that he has no ambition in that direction; and he cannot believe his suggestions will give countenance to any such imputation.

§ 617. It may be proper here to give the general definition of the word Bailment. This word is derived into the English language through the French, from the word *bailler*, to deliver or put into the hands of. It is, briefly, where

any personal thing is delivered, by one person to another, to keep, to carry, to use, to improve, mend or repair, and to return when the purpose is accomplished. The subject naturally divides itself into three species, according to the degree of responsibility required of the bailee. (1.) Where extraordinary diligence is required, and extraordinary responsibility imposed. This class includes Common Carriers, both of goods and passengers; and Common Innkeepers, the law of both of which species of bailment has been already discussed. (2.) Bailments which are upon compensation and which are supposed to be for the equal benefit of both the bailor and bailee, and where the ordinary rule of faithful service and prudent administration is all that is required. (3.) Bailments without reward or compensation, and which are understood to be for the sole benefit of one of the parties.¹

§ 618. It may help to render our views more intelligible to the student, as well as to the profession, if we pursue the distinction between gratuitous bailments and others, a little further. In the former case the undertaking is exclusively based upon personal confidence, and has no reference to the average degree of care and diligence in that particular business. The bailee does not offer his services, as one fit and safe to be employed in that particular way. The bailor makes his own examination and his own election, with no profession or recommendations for employment on the part of the bailee. But in other cases the relation of the parties is different. The bailee seeks for employment in a particular way and mode, and the bailor acts upon the implied assurance that it will be prudent and safe to employ him in that way.

§ 619. It seems to us, to reverse the order, that the proper

¹ The principles embraced in the foregoing definitions, will be found substantially the same adopted by the article on Bailments, 1 *Boüvier Law Dict.* 184, and the authorities there cited by the author, the Hon. Joel Parker, LL. D., of the Cambridge Law School, Harvard University.

distribution of the subject is into these three classes : (1.) Those bailments where the trust or confidence is merely personal and no reward either to the bailor or the bailee is stipulated or expected. This class will embrace Deposits, Mandates, and Loans. All that the bailor has any right to expect in either of these classes of bailments is, that the bailee should keep within the range of the bailment ; and, within that range conduct himself with the same degree of faithfulness and skill, that he does in his own business of equal importance. By keeping within the range of the bailment will be understood, that where goods are left merely for custody, the bailee should not put them to use, beyond what is necessary for their preservation, as the milking of a kine, or the driving of beasts to water, etc. And so also where goods are left for the gratuitous performance of one kind of service, that the bailee should not be allowed to exercise his discretion, and because he conjectures it will be assented to by the bailor, or will be advantageous to him, should allow something more or different to be done in regard to them. So also where the bailee receives articles of property, animate or inanimate, to be used gratuitously, in a particular manner, for a specified time or in a particular place, that he should not lend them to others, which he has clearly no right to do, the trust being purely personal ; or put them to any different use or for any longer time or in any other place than that implied in the bailment. With these limitations the gratuitous bailee is only responsible for the same degree of care, which he exercises in regard to his own business of equal importance.

§ 620. (2.) In the next division of the subject, we should place all those ordinary bailments, where the advantage and consequent obligation is understood to be mutual and equal, and where there is no special strictness of accountability or responsibility imposed upon the bailees. This will embrace pawns or pledges, and the ordinary class of bailments for hire, such as letting of things for use or improvement ;

leaving them to be safely kept or to have work performed upon them, for reward. This will embrace the three classes of the Roman law, denominated: (1.) *Locatio or locatio-conductio rei*; (2.) *Locatio custodiæ*; (3.) *Locatio operis faciendi*. This embraces what, in English, we call hirers of property for use, etc., the keepers of property for pay, such as innkeepers, warehousemen, wharfingers, etc., and the numerous class of mechanics, who undertake to refit or repair goods of different kinds; and also those who receive animals to train, or in any other way perform work upon them, as farriers, blacksmiths, trainers, etc. We have, as before stated, already sufficiently considered the responsibility of innkeepers and also of private and common carriers, called in the Roman law, *Locatio operis mercium vehendarum*. These two latter classes of bailment, innkeepers and common carriers, will constitute what we regard as the third division of bailments, already sufficiently discussed.

§ 621. In regard to the second class of ordinary bailments for reward, it may be briefly said, that the law requires of the bailee such degree of faithfulness and skill as is requisite to perform the undertaking acceptably and creditably, and this undoubtedly has reference to the degree of faithfulness and skill, which prudent men ordinarily expect in the management of their business by others, and which they generally put forth in such portions of their business as they conduct themselves. Having thus briefly distributed the work before us, we may proceed at once to consider the authorities bearing upon the several points.

CHAPTER II.

BAILMENTS WITHOUT CONSIDERATION.

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| <p>622. <i>Definition of deposit, mandate, and loan, the three species of bailment, without reward.</i></p> <p>§ 623. <i>Consideration of the degree of responsibility of such bailees ; only bound to good faith and fair dealing.</i></p> <p>§ 624. <i>In the case of deposits and mandates</i></p> | <p><i>the bailee must do as he would in his own business of equal importance.</i></p> <p>§ 625. <i>But it is held that in the loan of things for gratuitous use, the bailee is bound to extraordinary diligence, and responsible for slight neglect.</i></p> |
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§ 622. BAILMENTS without consideration, or gratuitous bailments, include, as we have said, Deposits, Mandates, and Loans. These, in the Roman Civil Law, were denominated: 1. Depositum. 2. Mandatum. 3. Commodatum. The two first of these are where the bailee acts for the benefit of the bailor, but without reward; and the last is, where the bailor has the use of the thing without compensation to the bailor. 1. A deposit is where the thing is left in the keeping of the bailee for an indefinite time, or until the bailor sees fit to reclaim it without any use, benefit, or compensation to the bailee. 2. A mandate is where the goods are placed in the possession of the bailee and he, without compensation, undertakes to do some act in regard to the goods, for the benefit of the bailor, as where the bailee suffers his servants to clean or grind the wheat of the bailor in his mill, without toll or fee. 3. Loan for use is where the bailee is allowed to use the thing, whether animate or inanimate, for a particular time and purpose, for his own advantage, without compensation or reward to the bailor. These definitions are of an elementary character, and will be found sufficiently verified by the opinion of

Lord *Holt*, Ch. J., in *Coggs v. Barnard*,¹ and by the most approved writers upon this topic.

§ 623. There has been considerable discussion, and some conflict of opinion, in regard to the precise duty which this species of gratuitous bailment imposes upon the bailee. It will be convenient to consider the two first kinds of bailment in one category, where the bailee has no advantage from the bailment, and the third in a separate view, since in this case it is the bailor who derives no advantage, and the bailee the exclusive benefit of the bailment. It has been claimed that in the two former cases the bailee owes no duty, except that of mere good faith, *i. e.* not to be guilty of such flagrant and gross neglect as to imply a fraudulent purpose; and that in the latter case, as the bailee receives the sole benefit of the bailment, that he is bound to the utmost care and diligence that no detriment befall the thing bailed. This may be true, in a general sense, and may afford, perhaps, about as near an approximation to the truth, in a practical way, as it will be possible to reach. The discussion of this point in *Coggs v. Barnard*¹ turned upon the point, how far the depositary is presumptively responsible for goods stolen from him, without any evidence or suggestion of connivance on his part. There is some controversy too in the books, whether if the depositary accepts the goods "to keep safely," he incurs any greater responsibility than when he merely accepts them to keep generally.¹ The opinion of Lord Coke,² is certainly not very clear, or apparently consistent with principle. He seems to suppose a mere depositary, who accepts goods to keep or to keep safely, which he declares to be the same thing, is responsible if they are stolen, whereas he would not be if they were taken to keep as his own, or for use, or on pledge; and so also of a factor or servant, who he says "that doing his endeavor

¹ 2 Ld. Ray. 909, 912, and authorities cited.

² Southcote's case, 4 Co. Rep. 83; s. c., Cro. Eliz. 815.

shall not be charged." And he here makes a distinction, as do some of the other cases, between a depositary accepting goods to keep, and to keep as his own. In short, it seems very obvious that Lord Coke and some others have assumed that the acceptance of goods "to keep safely," implied a warranty to that effect, and thus imposed all risks upon the bailee, as in the case of carriers and innkeepers. There could be no question of the entire validity of such a contract, if made upon sufficient consideration, and understandingly done, as would be the case where the bailment was induced by the special promise to keep safely. But that certainly is not the ordinary case of the deposit of goods for safe keeping, and where the depositary is not expected to derive any benefit from the bailment. It would scarcely be expected in such case that the bailee would warrant them secure against all perils. But it seems to us that this is the only mode of explaining the ground upon which Lord Coke, in *Southcote's case*, argued that a depositary was responsible for loss of the goods by theft. This could only be upon the ground that the bailee, by special contract, had assumed all risks, or else that theft is presumptive evidence of neglect, as held by Sir William Jones.³ But as the same learned author declares,³ if that was so held, the responsibility will be relieved by showing the exercise of diligence on his part and that the goods were stolen without his fault.

§ 624. It seems very obvious to us, that the discussions upon this point have been rather based upon a different construction of the import of terms, than upon any other difference of opinion. There can be no question that all which the bailor has any right to expect, in the case of an ordinary deposit is, that the bailee shall keep the goods with the same care he does his own goods of similar character. If he do not do this he is to that extent guilty of misconduct or bad faith, in not doing what the bailor had

³ Jones on Bailment, 39-44.

a fair right to expect of him. And no reasonable man would have any right to expect him to do more, upon a mere naked bailment, or deposit, without compensation. To say that the bailor might be thereby misled and induced to trust his goods in the hands of a careless man, which he would not have done if he had known the indifferent character of the bailee, seems to us no invincible obstacle to this view of the law. This is nothing of which the bailor has any right to complain, unless the bailee has so conducted as to mislead him upon this point. This is the precise rule laid down in *Coggs v. Barnard*⁴ by Lord *Holt*, Ch. J.; and all the more recent cases, which seem in any sense to qualify this rule, have proceeded upon special grounds, or else are not maintainable upon strict principle. It seems to us to be the duty of the bailor to learn the character of the bailee, before he intrusts his goods to his keeping. And if he chooses to incur the risk, without inquiry, and thus proceed blindly, he surely has no just occasion of complaint against the bailee. For in the first place, the bailee would scarcely be expected to entertain any very clearly defined notions of his own capacity, or incapacity, certainly, for the due execution of such a trust. And if we could, in any just course of argument, reasonably persuade ourselves, in any particular instance, that the bailee must have known that he was not entirely suitable to undertake such a duty, which is rather difficult to conceive, short of supposing that he was acting in the way of preconceived design to entrap the bailor, in order to obtain possession of his goods, for some ulterior purpose of advantage to himself and of consequent injury to the bailor, which will of course render him responsible for all loss or injury in consequence; short of this we should scarcely expect the bailee to be aware of his own deficiencies, it being proverbial, that the most careless and indifferent of men are least conscious of it. And in addition to this the bailor has no

⁴ 2 Ld. Ray. 913.

right to expect that the bailee, being conscious of his own deficiencies, would be ready to publish them to others without inquiry, no man being bound, in honor or good taste, to publish his own disgrace ; and if he had really done so, it would, most likely, have been regarded by the bailor as an affectation of humility, or else mere badinage. We conclude, therefore, that all which the depositor could demand is that the bailee keep the goods with the same degree of care he is accustomed to keep his own goods. And the same thing is true, we think, in the case of a mandate or delivery of the thing for the performance of some gratuitous service in regard to it.

§ 625. It may be proper here to say a few words in regard to loans for use, before we proceed to examine the cases. We shall use the word loan in this sense, although it is subject to some equivocation in consequence of being also in common use, to express the sale of articles for consumption, to be returned in kind and especially of money, which of course has no analogy to a loan for use, as in one case the title passes to the lender and is not expected to be restored, while in the other no property whatever passes, both the property and the right of possession remaining in the bailor, so that for any violation of the right of possession he may maintain an action in his own name, as may also the bailee for the bailor's benefit. The duty of the bailee in this species of bailment is defined to be, to take proper care of the thing ; to use it only according to the expectation of the parties ; and to restore it in proper time, and in proper condition.⁵ The elementary writers, and many of the cases, lay down the rule of obligation on the part of the bailee to be that of extraordinary diligence and responsibility for slight neglect.⁶

⁵ Story on Bailm., § 236.

⁶ Jones on Bailm., 65, 66, and authorities cited.

CHAPTER III.

DEPOSITS.

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| <p>§ 626. <i>The rule of responsibility here, to act in good faith, as the bailee conducts his own affairs.</i></p> <p>§ 627. <i>The rule of responsibility, as stated by Mr. Justice Blackstone, much the same.</i></p> <p>§ 628. <i>Special undertakings by the bailee, binding to the extent understandingly made.</i></p> <p>n. 4. <i>Summary of cases on the responsibility of depositaries.</i></p> <p>§ 629, and n. 7. <i>Further exposition of the rule. Degree of diligence depends on circumstances; not responsible for theft or robbery without his fault.</i></p> <p>§ 630. <i>If bailee put the goods to a use not justified by the bailment he is guilty of a conversion and responsible for all losses.</i></p> <p>§ 631. <i>In cases of joint deposit, where there is a special undertaking to keep and</i></p> | <p><i>restore to all jointly, the bailee cannot deliver to one. The remedy.</i></p> <p>§ 632. <i>How far is the depositary responsible for the fraudulent or felonious act of servants? It would seem the master should be responsible for the theft of his servant in the course of his employment.</i></p> <p>§ 633. <i>Cases in different States defining responsibility of depositary.</i></p> <p>§ 634. <i>Depositary not liable to an action for not restoring the thing, until after demand, unless he have put it to some use not justified by bailment.</i></p> <p>§ 635. <i>If the receiver of goods has an option to return the same or other goods of the same kind, the title passes to him.</i></p> <p>§ 636. <i>Mere deposits are countermandable or determinable at the option of both parties.</i></p> |
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§ 626. WE may now briefly examine the decisions upon the subject of deposits. Lord *Holt* says:¹ "Where a man takes goods in his custody to keep for the use of the bailor . . . he is not answerable if they are stolen without any fault in him; neither will a common neglect make him answerable; but he must be guilty of some gross neglect." Nor even then if he was guilty of the same neglect with respect of his own goods. Sir *William Jones* says, he must be guilty either of fraud or such gross neglect as will be evidence of fraud.² The same rule of responsibility, in

¹ *Coggs v. Barnard*, 2 Ld. Ray. 913.

² *Jones, Bailm.*, 46.

cases of deposit, is declared in other cases. Thus where the plaintiff being the owner of a cartoon (being a painting upon paper, pasted on canvas), delivered it to the defendant, without any particular agreement to take care of it, or to redeliver it safe, and without any agreement for reward;³ and it was kept by the defendant in a room next a stable, in which there was a well that made the picture damp and peel; it was held by the court that in a mere depositum without reward the bailee only assumes not grossly to neglect or abuse the deposit.

§ 627. In an early case⁴ in Massachusetts, the responsibility of depositors is very learnedly and thoroughly discussed by Chief Justice *Parker*. The learned judge here quotes with approbation the statement of the rule of law by Mr. Justice *Blackstone*,⁵ where the learned author says: "If a friend delivers anything to his friend to be kept for him, the receiver is bound to restore it on demand; and it was formerly held that in the mean time he was answerable for any damage or loss it might sustain, whether by

³ *Mytton v. Cock*, 2 Strange, 1099. See also *Lane v. Frankland*, 1 Ld. Ray. 646; s. c., 1 Corw. 100.

⁴ *Foster v. The Essex Bank*, 17 Mass. 479-514; s. p., *Edson v. Weston*, 7 Cow. 278; *Sodowsky v. McFarland*, 3 Dana, 205. A bank receiving a note for collection is bound to use due diligence therein, and make reasonable demand and notice, in order to charge the parties. *Fabens v. Mercantile Bank*, 23 Pick. 330. The depositary is not responsible for goods stolen without his fault. *Montieth v. Bissell*, Wright, 411. In all cases of gratuitous bailment the bailee is bound to extraordinary care. *Phillips v. Coudon*, 14 Ill. 84. A bailor who intrusts his goods knowing how and where the bailee will keep them, assents to such mode of keeping, and can maintain no action for the loss of the goods, without the fault of the bailee. *Knowles v. Atlantic & St. Lawrence Railw.* 38 Me. 55. The depositary is only liable for gross negligence or fraud. *Dunn v. Branner*, 13 La. Ann. 452; *Jourdan v. Reed*, 1 Clarke, 135. So also of the finder of a thing lost. *Dougherty v. Posegate*, 3 id. 88. One finding money is bound to restore it to the owner without compensation; but he may accept compensation if offered. *Ib.* In one case (*Johnson v. Reynolds*, 3 Kansas, 257), where a boarder requested the keeper of the house to deposit his money in his safe, and the safe was broken open and the money stolen, it was held that the keeper being a mere depositary was not responsible. So, too, money deposited with a stake-holder on a wager on the event of an election, is a mere deposit. *Jennings v. Reynolds*, 4 Kansas, 110.

⁵ 2 Comm. 453.

accident or otherwise, unless he expressly undertook to keep them only, with the same care as his own goods, and then he should not be answerable for theft or other accidents. But now the law seems to be settled, that such a general bailment will not charge the bailee with loss, unless it happens by gross neglect, which is construed to be an evidence of fraud. But if he undertake specially to keep the goods safely and securely, he is bound to answer all perils that may befall them for want of the same care with which a prudent man would keep his goods."

§ 628. We desire here to lay out of the account the effect of any and all special undertakings in the matter of bailments, since that will be different in every case where it exists, and all that need be, or in fact can be, said in regard to it is, that whatever special obligation the bailee understandingly assumes in regard to the mode of keeping the goods will be binding upon him, and he will be held responsible to the full extent of his undertaking. But we are not to understand, that every loose or general opinion, which the bailee may express to the bailor or his agent, at the time the goods are deposited, or subsequently, in regard to their safety, is to be constructed into an undertaking that he will hold himself responsible absolutely to that extent. It would ordinarily require very satisfactory evidence to establish the proposition that a mere naked depositary understandingly assumed any such responsibility. The mere expression of such an opinion in good faith, although made at the time of the bailment and operating as an inducement thereto, or if made subsequently, operating to induce its continuance, would create no responsibility, and if made in bad faith, or without any just ground of belief that such was the fact, would amount to the *mala fides* of the law, and should render the bailee responsible for the goods on general principles. So also if made with the purpose of having the bailor rely upon his assurance that he would undertake to stand responsible for

all losses or for any particular degree of care and diligence on his part, he would most unquestionably be held responsible to the full extent of his undertaking. And the same is true of every species of bailment, as we have before shown in regard to common carriers.⁶ But as we are now only defining the duties and responsibilities resulting from the mere bailment of goods, under different circumstances, we need not discuss the effect of special undertakings affecting such bailments further than to say they will be binding to the extent they are understandingly made.

§ 629. As to the general statement of the duty resulting from a mere deposit of goods, it could scarcely be more unexceptionable than in the language of Mr. Justice *Blackstone*:⁵ “He is to keep the goods as his own, and if robbed of them, or they are stolen without his fault, he is not responsible. But he must observe a reasonable degree of care, as in other cases, with reference to the nature of the goods and the particular circumstances of the bailment, as where one sent his horse to another to keep as a mere gratuitous bailee, and he turned the horse, after dark, into a dangerous pasture, to which it was unaccustomed, though the place would be perfectly safe to his own cattle, to this animal it would be otherwise, and the bailee would be responsible for any injury happening in consequence.”⁷

§ 630. So, too, a mere depositary has no right to use the property except where needful for its preservation; and if

⁶ *Ante*, pt. ii., ch. xii., xiii. See also *Kettle v. Bromsall*, Willes, 119, where it was held, than an increased responsibility is incurred where the bailee expressly agrees to exercise it. And here as the bailee undertook to *keep the goods safely*, he was held responsible even where robbed of them. But it is added, in the report of this case (3 Petersdorff, 363), “But in ordinary cases he is not liable if robbed.”

⁷ *Rooth v. Wilson*, 1 B. & Ald. 59. This was where the horse, through the defect of the fence which it was the duty of an adjoining proprietor to repair, fell from the field where placed, into another and was killed, the owner of the field was held responsible to the owner of the horse, and by consequence entitled to recover its value of the owner of the adjoining field through whose default the injury occurred. See also, *Fortune v. Harris*, 6 Jones, Law, 532.

he do so use or apply the property to any other purpose besides that of the bailment, he is responsible for all consequences. And where jewels were lodged in the hands of a goldsmith for safe keeping, and the latter broke the seal of the bag containing them, and carried them to the defendant's open shop in Fleet Street, London, and there pawned them as security for money borrowed, it was held, that the bailee was a trespasser, and responsible as for a conversion; and that although the pledge or pawn might be regarded as made in market overt, being made in an open shop in the city of London, yet not being a sale, but only a pawn, no title passed, and the defendant having acquired no title, was responsible in trover for the jewels.⁸

§ 631. And it seems clearly recognized, since the time of Demosthenes,⁹ that where two or more persons make a deposit jointly, the bailee is not at liberty to restore the thing bailed to one of the depositors, unless he is authorized to act for the others.¹⁰ But where the bailment of

⁸ *Hatch v. Hoare*, 2 Strange, 1187; s. c., 1 Wilson, 8, 9.

⁹ Jones, Bailm. 51, where the learned author thus states this early case: "Demosthenes was advocate for a person with whom three men had deposited some valuable utensil, of which they were joint owners; and the depositary had delivered it to one of them, of whose knavery he had no suspicion, upon which the other two brought an action but were nonsuited on their own evidence, that there was a third bailor whom they had not joined in the suit; for the truth not being proved, Demosthenes insisted that his client could not legally restore the deposit, unless all three proprietors were ready to receive it." And the same rule seems to have obtained in the Roman Law. D. 16, 3, 1, 36.

¹⁰ *May v. Harvey*, 18 East, 197. But in every case of a joint bailment it seems questionable how far each of the joint bailees may not have a presumptive authority to act on behalf of the others. That is certainly so held in regard to joint contractors or obligees. Each one may release the cause of action. Payment to one discharges the cause of action, and so of accord and satisfaction. It has rather the appearance, as if the early traditional case of Demosthenes may have led subsequent writers upon the law into some over-nice refinements as to the effect of joint deposits. We speak here, of course, only of those cases of joint deposit where there is only the implied duty on the part of the depositary resulting from the bailment. Where there is a special undertaking not to surrender the goods except by the joint order of all the bailors, that will be obligatory. And so also where some of the joint bailors give notice to that effect to the bailee, he might be bound in equity to act upon it, and not deliver except to the order of all.

joint property is made by one of the joint owners, without communicating the fact of the joint ownership to the bailee, or obtaining the consent of such owner to the bailment, the bailor is entitled to receive the thing bailed, and may sue for its recovery on refusal.¹⁰ But it seems that in case of the bailee restoring the thing deposited by two or more persons jointly, to one of them, this party could not afterwards join with the others in an action at law, for the recovery of the thing bailed of the depositary after he had restored it to one of the plaintiffs. The party thus having received back the deposit, is thereby estopped from maintaining an action against the bailee; and his joining the other bailors in the action will not relieve him from the effect of the estoppel.¹¹ "If the bailors, who did not assent to the redelivery of the goods to one of their number, have any remedy against the bailee for such wrongful act, it would be by bill in equity for the breach of trust. The bailee would be liable to make compensation to those who were injured by his breach of trust."¹²

§ 632. It being conceded by the authorities that a mere depositary is not responsible for any loss of the goods by theft or robbery from without, or for any accident happening to them without his fault, it becomes an important inquiry how far the depositary is responsible for loss by the fraudulent act of his servant, as by larceny committed by him. It seems very obvious upon general principles, that the bailee will be held responsible for the negligent act of his servant within the scope of the business intrusted to him, as where the servant of the bailee had the custody of the goods by the master's direction or employment, and through carelessness, such as the master would not have been guilty of in regard to his own business, exposed the goods to be lost or damaged. In such cases we see no reason why the master should not be held responsible, the same as

¹¹ *Brandon v. Scott*, 7 El & Bl. 234; s. c., 40 Eng. Law & Eq. 105.

¹² *Denman*, Ch. J., in *Brandon v. Scott*, *supra*.

if he had done the act himself. The rule of *respondere superior*, it would seem, must apply. This subject is considerably discussed in *Foster v. Essex Bank*,⁴ where the plaintiff deposited \$53,000 in gold coin with the defendants, in a chest in bags, the cashier giving a memorandum of the bags and contents (certified by a witness in whose presence the same had been weighed), concluding, "left at Essex Bank for safe-keeping," and signed by him as cashier. The gold was fraudulently taken out of the chest by the cashier. The rule is here distinctly declared, "that to make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment, and that if he steps out of it to do a wrong, either fraudulently or feloniously, towards another, the master is no more answerable than any other stranger." And it was held, in this case, that as the bank had no right to meddle with the chest or open it, and could not therefore communicate any, and did not attempt to do so, the act of the cashier in purloining the gold was wholly beyond the scope of his employment. The court concludes the bank is no more responsible for the theft of its officers, in taking and appropriating to their own use special deposits in the bank, than if they had been so taken by a stranger. The conclusion is most unquestionable upon the construction assumed by the court. But it seems to us the case is liable to some exception upon the point, how far the loss occurred by the misconduct of the servant, *in the course of his employment*. If the act of the servant is to be regarded as beyond the scope of his employment, merely because it was not done strictly in performance of the very things which the servant was expected by the master to do, it would be difficult to conceive of any *wrongful* act of the servant for which the master could be held responsible. The servant is never employed to do a wrongful act, but only legal and proper acts, in furtherance of the master's business in which he is employed.

If the servant's employment does not extend beyond the performance of his duty, he is never in the master's employ in doing a wrongful act. But if any such distinction as this ever existed, it has, we think, been long since exploded. It may be true that the cashier of the bank, or the teller, have a more direct, and constant, and uniform agency in receiving money on general deposit, and making correct entries in the books, than in keeping special deposits; and the responsibility of the bank is very different in the two cases. In the one case the bank become debtors for the money, and the money vests in the bank, and if lost by inevitable accident, or irresistible force even, it is the loss of the bank. But in the other case no property in the money passes to the bank, but they are the keepers merely, and if it be lost or damaged without the fault of the bank, or its servants and agents, there is no responsibility for such loss or damage on the part of the bank. But here was the admitted default of the servants of the bank, who had the exclusive and only custody of the goods, on the part of the bank. It was only by the act of the servants that the bank acquired any custody of the money, and it remained in the sole custody of the same servants who accepted the custody, and while so in the custody of such servants, it was fraudulently and feloniously purloined, and secretly carried away and converted to their own use. It seems to us this was just as much an act of the servant, within the range of his work or employment, as where the servants of an ordinary bailee, a wharfinger, or warehouseman, for instance, having the custody of goods, feloniously puts them to his own use. No one would think of holding such an act of the servant, without the range of his employment, because the master had no authority to break a package intrusted to his custody, or to authorize any one else to do so. If that rule of construction could be fairly maintained, the responsibility of the master for the act of the servant would be very essentially restricted. No mas-

ter has any authority to drive his carriage against another man's carriage, or over his children in the street; or to authorize his servant to do so. But if his servant do such an act, whether willfully or negligently, the master will be held responsible if done in the performance of the master's business wherein the servant was at the time employed.¹³

§ 633. But the general principles of the law applicable to bailments by mere deposit are, no doubt, well stated in *Foster v. The Essex Bank*,⁴ whatever we may think of the application of them to the facts of the particular case. And the same rule seems to be followed in the later cases, English and American. In an early case in Pennsylvania,¹⁴ it is said that good faith would seem to require of the bailee, in every case, reasonable care, and that must depend materially upon the *nature* and quality of the thing, the circumstances under which it is deposited, and something upon the particular dealing of the parties, the depositary being bound to slight diligence only, and the measure of his duty being that which persons take of their own business. And in Louisiana,¹⁵ it is said, a depositary of promissory notes to keep without reward, is only responsible for gross negligence in keeping them, or fraud in refusing to deliver them up.

§ 634. The depositary is not liable to an action for the deposit until after demand and refusal to surrender,¹⁶ unless where he has wrongfully applied it to some use not justified by the bailment, which will amount in itself to a conversion.¹⁷ As where the clerk of a court appropriated

¹³ 1 Redfield on Railways, 510, § 130, and cases cited.

¹⁴ *Tompkins v. Saltmarch*, 14 Serg. & R. 275.

¹⁵ *Lafarge v. Morgan*, 11 Martin, 462.

¹⁶ *Brown v. Cook*, 9 Johns. 361; *Hosmer v. Clark*, 2 Greenl. 308.

¹⁷ *Mott v. Petit*, Coxe, 298. See also *West v. Murph*, 3 Hill (So. Car.), 284. But in the case of *Aurentz v. Porter*, 56 Penn. St. 115, the court seem to have taken a somewhat different view of the law. It was here said, that where money paid into court is not allowed, by any rule of the court, to be deposited to the credit of the court, it is the duty of the prothonotary to take it into his custody

money to his own use, where it had been paid into his office in pursuance of a tender, the court being of opinion, that after the termination of the controversy the party to whom the money was awarded was entitled to have the identical money deposited, and if used by the clerk he was entitled to recover its value when deposited, although it had depreciated since, and interest upon that value to the time of judgment. If one receive goods to forward to

and keep it safely; but as he is an involuntary or official bailee, he is bound to that degree of care which prudent men exercise. He was not bound to keep the same identical money, and, although it was coin, he might make himself a debtor, and being so he might discharge himself by paying the amount in legal tender notes. This seems to us a somewhat remarkable decision. The real points involved do not seem to have been brought out in argument even. There might have been special reasons for treating the case tenderly. The prothonotary was an official custodian of the money; and on general principles he was guilty of official misconduct in putting it to his own use, as he did by depositing it to the credit of his own bank account, and punishable, by imprisonment, for the contempt of the court. The most that could have been claimed on his behalf was, that he might have made a special deposit of the money in bank, by opening an account there for this particular money, and whatever the bank were bound to return him for the deposit he could tender in his own discharge. But not having done this, he was clearly bound to restore the very money, and he had no election to become a mere debtor for the money. Any bank would accept it as a specific deposit. By putting the money to his own use, he was guilty of embezzlement, and some persons in England, of high social position, have been convicted and transported for similar offenses. We hope there is some apology for the decision which does not occur to us, as resulting from the general principles involved in the case. We recollect, while exercising the office of Chancellor, in Vermont, to have made a peremptory order against our clerk of the court, for putting money in court to his own use, to restore the same in sixty days, or accept the alternative of a warrant of commitment for contempt. No doubt existed then of the duty of a court of chancery or any other court, to do so. The money was forthcoming, and as we had then no such depreciated currency as now, no question of that kind arose. But we should be sorry to have it supposed there could be any question, that bailees of money of this character are to be held responsible for the safe-keeping and production of the identical money deposited with them. Any other rule we should apprehend must lead to great looseness both of principle and practice in such matters. The more correct view of this question seems to be maintained in a recent case in Illinois. In *re Western Marine & Fire Ins. Co.*, 38 Illinois, 289, where it was held, that court funds, being made a specific bailment for safe keeping, the same money to be returned, there is no change of ownership, and the court may follow its specific property even into the hands of an assignee in insolvency.

one place, although without pay or reward, still if he ship them to another port or place, he is liable for any loss thereby occurring.¹⁸ He is bound by the instructions of the bailor.

§ 635. Whenever the person receiving the goods has an option to return the same thing, or another article of the same kind and value, the property passes to him as effectually as in the ordinary case of sale or exchange, and the risk is with the bailee,¹⁹ or person receiving the goods.

§ 636. A mere deposit of money or other thing is always subject to recall at the election of the depositor. Thus where the plaintiff deposited money with the defendant to be paid out for the benefit of a third person, he being under no legal obligation to do so, he has a right to countermand the appropriation, and recall the money at any time before it has been actually appropriated, or such arrangements have been made between the depository and the person for whose benefit the money was left, as amounts to a virtual appropriation. Anything short of this will not affect the right of the depositor to recall the money.²⁰ Bailments by mere deposit seem to be determinable at the election of either party, upon reasonable notice to the other party to surrender the possession on one part, and to resume it on the other.²¹

¹⁸ *Ferguson v. Porter*, 3 Florida, 27.

¹⁹ *Chase v. Washburn*, 1 Ohio (N. S.), 244. But the privilege of the depository of gold dust to convert it into coin, cannot change his liability into that of a debtor to the consignee. *Goodenow v. Snyder*, 3 Iowa, 599.

²⁰ *Winkley v. Foye*, 33 N. H. 171.

²¹ *Rowlston v. McClelland*, 2 E. D. Smith, 60.

CHAPTER IV.

MANDATES.

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| <p>§ 637. <i>A voluntary undertaking not obligatory; but if entered upon must be faithfully performed, according to the expectation created.</i></p> <p>§ 638. <i>One without reward or profession of skill, only bound to act according to his ability. The point illustrated by Lord Loughborough, Ch. J. Common Pleas.</i></p> <p>§ 639. <i>One may, by special undertaking, or by intermeddling with goods, make himself responsible for all losses.</i></p> <p>§ 640. <i>A mandatary may use the thing in a reasonable manner, by himself or his servants; but if he possess skill he</i></p> | <p><i>is bound to use the same as a hirer, who undertakes to use skill.</i></p> <p>§ 641. <i>A mandatary, who does not stipulate for compensation, must be understood to act without, unless the circumstances indicate the contrary.</i></p> <p>§ 642. <i>The promise of a bailee to return the goods does not increase his responsibility.</i></p> <p>Notes 1; 2, 5. <i>Cases cited and points discussed.</i></p> <p>§ 643. <i>A mandate is dissolved by the death, insanity, or bankruptcy of either party.</i></p> |
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§ 637. THIS was the very species of bailment involved in the case of *Coggs v. Barnard*¹ where the defendant undertook, without reward, to remove several casks of brandy

¹ 2 Ld. Ray. 909. The same rule is illustrated in *Elsee v. Gatward*, 5 T. R. 143. The same rule was adopted in the American courts at an early day. *Thorne v. Deas*, 4 Johns. 84; *Rutgers v. Lucet*, 2 Johns. Cas. 92. *Kent*, Ch. J., says: "A review of the cases will show that by the common law a mandatary, or one who undertakes to do an act for another, without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it and does it amiss." But in such cases the bailee must exercise care and diligence according to the nature of the property and the exigencies of the business. Thus, where one undertook to carry money from Boston to New York without compensation, and left it in his valise in one cabin, while he slept in another, notwithstanding the steward had told him it would be safer in the office of the boat, he was held responsible for the loss. *Tracy v. Wood*, 3 Mason, C. C. 132; *ante*, pt. i. ch. ii., § 12; *Bland v. Wormack*, 2 Murphy, 373. Money requires more watchful care than most other property. *Montieth v. Bissell*, Wright, 410; *Jenkins v. Motlow*, 1 Sneed, 248. But if he conducts the transmission of money, as prudent men ordinarily do similar business of their own, he is not responsible. *Jameson v. Livingston*, 35 Mo. 487.

from one cellar to another, and by the negligence of defendant's servants, in depositing the casks at the end of the transportation, one of them was staved and a portion of the brandy spilled. The negligence was held a breach of trust, or of the confidence reposed, and therefore a good ground of action. But it is said in this case, that a mandatary only becomes responsible for the act of himself and his servants, and not for the act of a stranger; and so, if a drunken man in the street had pierced the cask of brandy, and loss had thereby ensued, he would not be responsible. As this is an undertaking to do something in regard to the goods bailed, the extent of the responsibility of the bailee depends very much upon the circumstances.* If the mandatary merely promise to do the thing, without reward, the undertaking being without consideration is not binding; and if he do nothing toward the performance, no action will lie against him.¹ But if he enter upon the performance, the confidence created by the delivery of the goods imposes upon the bailee the duty of performing the service according to the expectation thus voluntarily created.

§ 638. Thus where a general merchant undertakes, voluntarily and without reward, to enter a parcel of goods for another, together with a parcel of his own of the same sort, at the custom-house for exportation, but makes the entry under a wrong denomination, whereby both parcels are seized, it was held that having taken the same care of the goods intrusted to him which he did of his own, and not having received any reward, and not being of a profession or employment which necessarily implied skill in what he undertook, he was not responsible for the loss.²

² *Shiels v. Blackburne*, 1 H. Bl. 158. The mandatary is liable only for gross negligence, and what shall amount to that is for the jury to determine, under all the circumstances. *Doorman v. Jenkins*, 4 Mo. & M. 170; 2 Ad. & Ellis, 256. So also in *Storer v. Gowen*, 18 Maine, 174. A bailee of money to carry without reward, which is lost, but his own money is not lost, is thereby shown not to have

Lord *Loughborough*, Ch. J., here said: "I agree with Sir William Jones, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker, or a clerk in the custom-house, had undertaken to enter the goods, a wrong entry would in them be gross negligence because their situation and employment necessarily imply a competent degree of knowledge in making such entries, but where an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom-house, such a mistake as this is not to be imputed to him as gross negligence."

§ 639. But one may, by special undertaking, or by intermeddling improperly with the goods, make himself responsible for any loss which befalls them. Thus in one case,³ where the captain of a vessel took charge of a box of gold

exercised the same care of the mandate as of his property, and is responsible. *Bland v. Wormack*, 2 Murphy, 373. Where one received a promissory note, on his voluntary undertaking, without reward, "to secure and take care of it," he was held not bound to take any active measures to obtain security, but only to keep the note securely, and receive the money due thereon when offered; and that the owner could not recover of him for the loss of the note without proof of fraud or gross negligence. *Whitney v. Lee*, 8 Met. 91. Where one undertakes business not within the range of his ordinary occupation, in order to charge him for want of skill or successful conduct of the business, it seems necessary to show that he undertook it for pay, or in some way represented himself competent to the undertaking, or else that he did not act with fidelity. *Dart v. Lowe*, 5 Ind. 131. A mandatary is only responsible in case of gross neglect. *Kemp v. Farlow*, 5 Ind. 462; s. p., *McNabb v. Lockhart*, 18 Ga. 495. He is only liable for bad faith or gross negligence. *Skelley v. Kahn*, 17 Ill. 170. Gross negligence is not of itself fraud, but it may be used in evidence of fraud, or of violation of that good faith presumed in every case of bailment. *Tudor v. Lewis*, 3 Met. (Ky.) 378. Where the mandatary exercises the same care, diligence, and skill, which he, or an ordinarily prudent man, would do in his own business of equal importance and difficulty, he is not responsible. And this question is one for the jury under proper instructions. *Fulton v. Alexander*, 21 Texas, 148.

³ *Nelson v. Mackintosh*, 1 Stark. 237.

and silver coin, and other valuables without reward, and in the course of the voyage opened the box to assure himself there was nothing contraband in it, and afterwards took care of the box as of his own valuables, but it could not be found at the end of the voyage, he was held to have assumed the responsibility by opening the cask, to guard against all perils, and not having done so judgment was given against him.

§ 640. Although a mandatary must use the thing according to the implied terms of the bailment, and if he do not is responsible for all consequences, this does not necessarily imply that he must limit the use to what is personal to himself. One who asks the privilege of trying a horse on sale, if the agent consents, is not limited to merely trying it himself, but may put a competent person on the horse for the purpose of trying it.⁴ And here a rule to set aside the nonsuit was refused. But one who rides horses, at the request of the owner, for the purpose of exhibiting and offering them for sale, without any benefit to himself, is bound to use such skill as he possesses, and if proved to be conversant with, and skilled in horses, is equally liable with a borrower, for an injury done to the horse.⁵ The proper distinction between the responsibility of a borrower and one who takes things for hire, is here very justly stated by the judges. *Parke*, Baron, said: "The

⁴ *Camoy's v. Scurr*, 9 C. & P. 383, *Coleridge*, J.

⁵ *Wilson v. Brett*, 11 M. & W. 113. Where skill and care are required in the performance of an undertaking, and a party professed to be skilled in the business, and undertakes for him to do it, he is bound to perform it in a skillful and proper manner. *Kuehn v. Wilson*, 13 Wisc. 104. And the same rule will most unquestionably result from the confidence reposed or from the reward promised. The only difference seems to be that the law implies the profession of skill competent to perform the undertaking, where it is performed or promised upon compensation, whereas no such profession is implied, where the undertaking is gratuitous," and this seems to be the precise distinction pointed at in the first case cited in this note. But one who voluntarily undertakes any business for another is bound to follow instructions and to exercise reasonable care and diligence in the performance of the duty, and is responsible in case of loss by neglect, although the service be gratuitous. *Fellowes v. Gordon*, 8 B. Monr. 415.

defendant was shown to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use ; if he did not, he was guilty of negligence. The whole effect of what was said by the learned judge as to the distinction between this case and that of a borrower, was this: that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who in point of law represents to the lender that he is a person of competent skill. In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it." *Rolfe*, Baron, the late Lord *Cranworth*, said: "The distinction I intended to make was, that a gratuitous bailee is only bound to exercise such skill as he possesses, whereas a hirer or borrower may reasonably be taken to represent to the party who lets, or from whom he borrows, that he is a person of competent skill. If a person more skilled knows that to be dangerous which another not so skilled as he does not, surely that makes a difference in the liability. I said, I could see no difference between negligence and gross negligence ; that it was the same thing, with the addition of a vituperative epithet ; and I intended to leave it to the jury to say whether the defendant, being, as appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence."

§ 641. Where the mandatary has made no agreement for his compensation, and there is nothing in the relation of the parties or the nature of the business to indicate that such probably was the intention of the parties, it will be regarded as a case of gratuitous procuration, and the service without compensation.⁶ A mandatary, acting for himself as well as others, cannot recover on a *quantum meruit*.

⁶ *Lafourche Navigation Company v. Collins*, 12 La. Ann. 119.

The procuration is gratuitous, unless there is some agreement for compensation.⁷

§ 642. Although a mandatary in common with all other bailees may stipulate for the degree of care and responsibility, it was held that a provision in the lease of furniture, that the lessee should "surrender the property in as good condition as reasonable use and wear thereof would permit," did not vary the duty imposed by the general law of bailments, and therefore, that the bailee was not responsible for loss of the same by fire without fault on his part.⁸ And Sir William Jones contends, with good reason, we think, in his commentary on the case of *Coggs v. Barnard*,¹ that the undertaking to carry, and to carry safely, *salvo et secure*, in the language of the early formula of the writ, are the same thing, it being implied in every undertaking to carry, that the office shall be done safely and securely.⁹

§ 643. There seems to be no doubt of the right of the parties either by consent or separate action to terminate a bailment of this character, the same as a mere deposit, unless some rights in other parties have been created in confidence of the conduct of the parties to the bailment. This general principle is recognized in a considerable number of cases.¹⁰ And the death of either party must, as a general thing, put an end to the bailment, since there is no longer any authority or capacity to carry the bailment further into effect. What is already accomplished will of course be held valid.¹¹ And the same result follows from

⁷ *Wilson v. Wilson*, 16 La. Ann. 155. In the absence of evidence that the use of chattels was intended to be gratuitous, the owner is entitled to the fair value of such use. And the fact that such use was under the mutual expectation that the bailee would purchase the property, does not raise the presumption that the use was gratuitously given. *Rider v. Union India Rubber Co.*, 5 Bosw. 85.

⁸ *Hyland v. Paul*, 33 Barb. 241.

⁹ *Jones on Bailm.*, 60, 61.

¹⁰ *Salte v. Field*, 5 T. R. 211, 213; *Lilley v. Barnsley*, 2 M. & R. 548; s. p., *Orser v. Storms*, 9 Cow. 687.

¹¹ *Story, Bailm.* §§ 202-204; *Hunt v. Rousmaniere*, 2 Mason, 242; s. c., 8 Wheat. 174.

the marriage of a female, being a party to the bailment, or from either of the parties becoming insane, or being placed under guardianship.¹²

¹² Story, Bailm. § 206. And the same result follows the bankruptcy of either party. Id. § 211.

CHAPTER V.

LOANS FOR USE OR BAILMENT OF THINGS FOR USE, WITHOUT
COMPENSATION.

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| <p>§ 644. <i>The borrower must exercise the utmost care, but not responsible for theft or robbery.</i></p> <p>§ 645. <i>The argument and illustrations of Sir William Jones not coincident. The latter seem only to require the borrower to keep within the bailment, and to do as he would by his own.</i></p> <p>§ 646. <i>How far the borrower bound to use personally, dependent on circumstances.</i></p> <p>§ 647. <i>Some latitude of construction allowed, but not a fundamental departure.</i></p> | <p>§ 648, and n. 4. <i>The law of New York in terms very strict, but less so in application.</i></p> <p>§ 649. <i>The rule in Vermont seems to require only ordinary care.</i></p> <p>§ 650. <i>Final summing up of the law on this point. The borrower puts the thing to any other use at his peril, and he must do all that he would to preserve his own property of equal value.</i></p> <p>§ 651. <i>The borrower is not responsible for loss by robbery without his fault.</i></p> |
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§ 644. THE rule of responsibility in the case of borrowers, as laid down in the leading case¹ on this subject, is, that the borrower of goods is responsible for any damage or loss, if it was occasioned by his neglect, or if he used the goods in a manner not warranted by the terms of the loan. *Holt*, Ch. J., says here: "The borrower is bound to the strictest care and diligence . . . because the bailee has a benefit by the use of them, so as if the bailee be guilty

¹ *Coggs v. Barnard*, 2 Ld. Ray. 909. And in *Wheelock v. Wheelwright*, 5 Mass. 104, it was held, that if one borrow a horse to ride to one place and go with the horse to another, he will be responsible for any accident happening to the horse even by inevitable accident, and the owner is not bound to receive the property back in an injured state, in such cases, but if he do, will be entitled to all damages. So also in *Murray v. Burling*, 10 Johns. 172, the same rule was applied to the misapplication of money, the owner was allowed to maintain trover, the defendant having no interest in or right to use the money. See also *Gibbs v. Chase*, 10 Mass. 125.

of the least neglect he will be answerable." The learned judge also says, if the thing borrowed, as a horse, for instance, is used to go in a different direction from that for which it was borrowed, or is kept for a longer time, "if any accident happen," out of the place, or after the time, for which it was borrowed, "the bailee will be chargeable; because he has made use of the horse contrary to the trust, . . . and it may be" but for that "the accident would not have befallen him." But he adds that if the horse is stolen from the stable of the borrower, without his fault or that of his servants, he is not chargeable. And Bracton says, the borrower must use the utmost care, but is not responsible, "where there is such a force as he cannot resist." But the rule of responsibility is here said to be the same in case of a borrower and a hirer of goods; neither are responsible for the loss of the goods by robbery or theft.

§ 645. But Sir William Jones,² who professes to follow the rule of the Roman law, seems to indicate a somewhat more severe rule of responsibility in regard to the bailee. He says, the owner of the thing loaned is only to bear such loss or damage as could not have been avoided by a very careful and vigilant man, and that the borrower is answerable for slight neglect, and is bound to exercise extraordinary care. But he admits that if the lender "perfectly knew the quality, as well as the age of the borrower, he must be supposed to have demanded no higher care than that of which such a person is capable; as if Paul lend a fine horse to a raw youth, he cannot exact the same degree of management and circumspection, which he would expect from a riding-master, or an officer of dragoons." But most of the numerous and very ingenious illustrations of this very able writer on this point, although intended of course to illustrate the extreme degree of responsibility required of the borrower, do not seem to us always to have that bearing. As where the borrower of the horse

² Jones, Bailm. 64, *et seq.*

uses him late at night, or in travelling an unusual route, and is robbed in consequence, or the borrower of a masked habit and jewels, who is robbed of them at a gaming-house, where he went after the masquerade or where the owner of the house, in flames, snatches an article of his own, of far less value, and omits to take the borrowed silver urn, of far greater value, which he might have taken with the same ease, but for his preference to save his own goods. The two former cases seem to us nothing more or less than a loss of the goods by putting them to use in a manner not warranted by the bailment; and the last case is one of clear failure to take the same care as of his own goods. And the case of borrowing a horse to use in battle, in order to save the hazard to his own horse, is a clear case of fraud, by *suppressio veri*. How far it is of a character to invalidate the bailment, or to impose any greater responsibility upon the bailee is, perhaps, more questionable. The author seems to suppose, that if the bailment is induced by such a suppression of fact, the bailee is responsible to the same extent, as if he had taken the horse without permission of the owner; no permission, and one fraudulently obtained, being of the same force. It may be questionable whether the fraud may not be rather too remotely connected with the bailment to exert any legal influence upon it. But however that may be, it must be conceded, that most of the illustrations of this learned author only go to the extent of requiring the borrower to keep strictly within the use for which the loan was made and be careful to act in the utmost good faith, the true test of which is to do as you would be done by, or as you would do by yourself in similar circumstances.

§ 646. But it must be confessed that most of the decided cases, while they maintain the distinctions we have stated, in regard to borrowers and the degree of their responsibility, seem also to require something more. Thus in *Bringloe v. Morrice*,³ it was decided that although the hirer of a horse

³ 1 Mod. 210; 3 Salk. 271.

for money, and possibly the borrower, without reward, but for a definite time, may allow his servants and possibly others to ride or drive the animal, it is not so in the case of borrowing for a single use, or for an indefinite time. But this must depend very much upon the relation of the parties, and the circumstances attending each particular case, to be judged of by the jury. There are an indefinite number of supposable cases, which will readily occur to all having had experience in these matters, where it would savor of extreme refinement, almost bordering upon the absurd, to suppose that the borrower expected the thing to be put to the use for which it was borrowed by the bailee, only in person. If a lady of fortune borrows, as she may be supposed sometimes to do on emergencies, farming tools, or the plant and machinery for removing buildings, or blasting rocks, or even horses and carriages for her own personal use or for the cultivation of land; in all these cases and many others, no man in his right senses could for a moment imagine, that either the bailor or the bailee expected the lady to superintend the use in person. But there are doubtless many other cases, where there could be no question the bailment was intended exclusively for the personal use of the bailee; and to allow others to interfere with, or direct the use, might well be regarded a perversion of the bailment. In all cases, no doubt, the use must be according to the expectation, at the time of the bailment, as nearly as circumstances will allow, or the deviation will be regarded as a misapplication and so a conversion.

§ 647. But in regard to this there will be room for considerable question and some qualification. Emergencies will be liable to arise, where it would not be reasonable, or perhaps possible, to carry out the use of the thing loaned precisely, or perhaps substantially, in conformity with the expectation of the parties at the time of the bailment. In all these cases there will be no hesitation in excusing the bailee for a reasonable exercise of discretion, with reference

to the altered state of the circumstances, since in all contracts there is always an implied reservation or condition for latitude of construction in case of the intervention of unexpected events. To this extent, and for these reasons, a merely circumstantial departure from the strict use intended by the bailment will be held justifiable. But where, by the occurrence of unexpected events, it becomes impracticable to carry out the substantial terms of the bailment, nearly in the manner contemplated by the terms of the contract, it should be regarded as superseded by the combination of events, not contemplated by the parties at the time of the contract.

§ 648. In New York it has been considered that the borrower is held to extraordinary diligence and responsibility even for the slightest neglect; he is bound to exercise all the care and diligence that the most careful persons are accustomed to apply to their own affairs; and in his case the omission of the most exact and scrupulous caution is regarded as culpable.⁴ One who borrowed a carriage in June, and in December returned it to the same stable where he took it, after the stable-keeper had ceased to be the agent of the owner of the carriage, was held to have been guilty of a conversion. It should have been returned to the residence of the owner.⁵

§ 649. Where one man's horse is harnessed into another man's carriage by the mutual consent of the parties, and

⁴ 1 Abbott's Digest, 368; *Scranton v. Baxter*, 4 Sandf. Sup. Ct., 5. But it is here said, one who borrows a horse for his own personal use may return him by the agency of another. The rule of extraordinary care and diligence on the part of the borrower is held in other States. *Phillips v. Coudon*, 14 Ill. 84; *Wood v. McClure*, 7 Ind. 155; *Howard v. Babcock*, 21 Ill. 259; *Eastman v. Sanborn*, 3 Allen, 594. But in the last case there was an evident want of ordinary care, in improperly feeding and watering a borrowed horse, and the borrower was held responsible for all loss, including the expense, after the horse was returned to the owner, of the attempted cure by a veterinary surgeon, even where the treatment was improper and contributed to the death of the horse, there being no fault on the part of the owner, in the employing the surgeon, or on the part of the latter in doing the best he could to save the animal.

⁵ *Esmay v. Fanning*, 9 Barb. 176.

while the first named is driving the horse by the request of the other, neither deriving any advantage from the use, other than the amusement and recreation arising therefrom to both, the person so using the carriage is liable for any damage occurring to it, in such use, by his want of ordinary care and prudence.⁶

§ 650. It will be seen that the cases upon this point are not very numerous, and the terms in which the responsibility of the borrower are stated seem to savor of extreme strictness, following the general language of the civil law and continental writers ; but when we come to the illustrations of those writers and the cases under the common law, which have gone into judgment, they do not altogether establish that extreme degree of responsibility, which the speculative dogmas of the writers seem to demand. The cases all agree that the borrower acquires no property in the thing borrowed, and consequently has no assignable interest, and no right to delegate the trust to another, it being in its nature strictly personal ; and that if the bailee presume to do this, or to put the thing to any different use, even as to time and place, from that for which he borrowed it, he becomes responsible for all loss or damage, although happening, not only without any possible fault or omission of his, but absolutely by inevitable accident or irresistible force. The reason of this is very obvious. By putting the thing to a use for which he had not the consent of the owner, he terminated the bailment and became a trespasser, and as such made the property his own, unless the owner consented to waive the tort and accept its return, which of course he would not do, while the property was in an injured state. So too if the bailee is unfaithful in the trust, and conducts himself less watchfully than in his own business of equal importance, he is responsible for all consequences. It does not appear to us, that the decided cases really justify any more strict rule of responsibility

⁶ *Carpenter v. Branch*, 13 Vt. 161.

in the case of borrowers than this, although much of the reasoning of the judges seems to go beyond this.⁷

§ 651. In a recent case⁸ where a borrowed horse was, in the course of the very use for which it was borrowed, taken from the bailee by cavalry soldiers of the United States, it was held a good defense. We see no reason to question the soundness of the decision, for although it was not the irresistible force of the English common law, that of the public enemy, it was none the less irresistible in point of fact. And whatever might have been the reason or excuse for the act, was not material to the defense. It was clearly a case of robbery, without the fault of the defendant, unless he provoked it, which was not claimed. It seems to have been merely a question whether the borrower should pay for the horse and then pursue the claim against the government, or the owner of the horse should do it in the first instance.

⁷ *Bennett v. O'Brien*, 37 Ill. 250, where it is said that the borrower of domestic animals for use, and who must by consequence keep them, is not the less a gratuitous bailee, and must exercise extraordinary care. The rule of the foreign law in regard to the expenses of the thing borrowed seems to be that ordinary expenses, such as the keep and shoeing of a horse, or small repairs in a carriage, must be borne by the borrower, extraordinary expenses, such as those caused by sickness of the horse, or pursuit in case of being stolen or procuring a new wheel for the carriage in place of one that failed, must be borne by the lender. *Story, Bailm.*, § 273. But these questions are not settled at common law, and seem to be regarded by this learned author as not entirely free of doubt, § 274.

⁸ *Watkins v. Roberts*, 28 Ind. 167.

CHAPTER VI.

BAILMENTS FOR HIRE OR REWARD, WHERE NO EXTREME RESPONSIBILITY IS INCURRED.

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| <p>§ 652. <i>The terms ordinary, slight, and gross negligence, not well suited to define the duty expected from an ordinary bailee for hire.</i></p> <p>§ 653. <i>They seem, all of them, to express something culpable, and not entirely trustworthy.</i></p> <p>§ 654. <i>This particular distribution of the degrees of care, or neglect, seems to have been accidental at first, and has been followed, without examination.</i></p> <p>§ 655. <i>The law recognizes no degree of negligence as excusable; but defines</i></p> | <p><i>diligence with reference to the importance and difficulty of the business.</i></p> <p>§ 656. <i>In official undertakings, of a merely ministerial character, the bailee is bound to know the law and conform to it in all particulars.</i></p> <p>§ 657. <i>One who undertakes professional or mechanical work is bound to do it well, and to do it promptly.</i></p> <p>§ 658, and notes. <i>The English judges and civil law writers require of bailees for hire entire competency and faithfulness.</i></p> |
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§ 652. THE general subject of responsibility, in the ordinary class of bailments for hire or reward, not embracing innkeepers or carriers of goods or passengers, where an extreme degree of responsibility is exacted by the law, as we have already seen,¹ has been variously defined. The more common mode of defining this medium degree of care and responsibility, has been by calling it ordinary care and responsibility, by which is understood the degree of care and responsibility which ordinary men, or the majority of men, take in their own affairs of equal importance. This definition results from dividing negligence into three classes: slight neglect or negligence, ordinary and gross neglect or negligence, with the correlative terms of slight care, common care, and extreme care. These terms have been used

¹ Parts ii., iii., v.

so long that it would be, at this late day, rather a hopeless undertaking, to substitute any other terms in their place. But the thing has been several times attempted; and there seems to be a somewhat general feeling among the profession, that these terms do not afford a very accurate measure of the degree of responsibility which is intended to be defined by them.

§ 653. We have attempted elsewhere to show that the terms ordinary care, and ordinary neglect or negligence, do not express the degree of diligence which we expect in the common class of bailees for hire or reward, such as official, professional, and mechanical agents, or commissaries,² but that in fact it defines a very subordinate or inferior degree of care and responsibility, and such as careful and prudent men never exercise in their own affairs of importance, and never desire to trust to, in others, in any important concern. Even slight neglect, clearly indicates something culpable, to the mind of a careful and trustworthy person; and the same is true of ordinary neglect, in a still more marked degree. We seem, by the use of these terms, to be attempting to measure different degrees of blame or culpability. The terms do very well, as a measure of criminality, but answer no good purpose, as a measure of diligence and faithfulness, which is really what men desire to find in those to whom they are willing to confide the important concerns of life. Nothing short of absolute faithfulness and skill will suffice in an agent or employee. Anything short of this is sure, with careful and prudent men, to disgust and to preclude, at once and forever, all future trust or confidence.

§ 654. Hence we think the attempt to define three degrees of negligence or faithfulness, is rather an idle speculation, or refinement, which having been ingeniously presented at an early day by writers of acknowledged force

² *Briggs v. Taylor*, 28 Vt. 180. This opinion will be found *ante*, pt. iii., ch. i. in note.

and ability, and found convenient in use, has been hitherto followed, without much examination into its real foundation. The truth is, that there are unquestionably an indefinite number and variety of measures of knowledge, skill, and experience upon almost all subjects. But the assumption of dividing them into just three degrees, no more, no less, is as purely arbitrary and chimerical, as to divide any other moral or intellectual quality, into just so many degrees, and no more.

§ 655. But the fundamental and unanswerable objection to all this, as applied to bailments, is, that we do not, in fact, intend to recognize any degree of neglect or negligence as excusable. But, of course, we expect and require different degrees of watchfulness in the execution of the several trusts, implied by the different classes of bailments, according to the nature of the business and the circumstances and conditions of the employment. But in the language of the divine law, it is expected of all stewards that they be found faithful. And this word faithful is to be measured by the exigencies of the employment.

§ 656. We conclude, therefore, that in each one of this class of bailments of which we are now speaking, the bailee must exercise the degree of skill and faithfulness which the nature of the employment implies or demands. In official employments it is implied that the bailee knows the law applicable to his business and that he possesses skill and ability to do what the law requires, and that he will do it in the time and manner required by the law, and in case of failure will respond in damages. This rule applies to all official and professional undertakings where the duty is clearly defined by the municipal law.

§ 657. In regard to professional undertakings outside of the official duties imposed upon officers of the municipal law, the rule of responsibility and care is much the same that it is in the undertakings of mechanics and others asking employment by way of commission in the several

departments of business, as in the case of physicians, surgeons, blacksmiths, watchmakers, warehousemen, and others. The undertaking being upon consideration and for reward, and not upon mere personal confidence, as in the former classes of bailment discussed in the next preceding chapter, it is not sufficient, that the bailee transact our business committed to him, in the same manner he is accustomed to attend to his own affairs of a similar nature. He is bound to the exercise of that knowledge and skill, in the matter he undertakes, which is requisite to accomplish it, in a reasonable time, and in a satisfactory manner. Every man desires his business done promptly, and well done, and unless there are some special circumstances indicating that the employer had no fair ground or right to expect that, he may always demand it. In short, in all commissions of business, for hire or reward, the commissary is bound to exercise skill and care adequate to the successful accomplishment of the work, in a reasonable time, and according to the instructions of the employer. Anything short of this is a failure, and as such culpable, and renders the party responsible in damages, for the difference in value to the employer, between what was done and what should have been done. He is bound to do his work as competent and faithful men in that department do their work.

§ 658. A slight examination of the decided cases upon this point will show that this is the rule of responsibility recognized in the English common law at the present time. The English judges, in defining the degree of negligence, which will subject this class of bailees to an action for want of skill or faithfulness, seem to measure it by what a prudent man exercises in his own concerns, of the same or similar character. Thus in *Duff v. Budd*,³ *Dallas*, Ch. J. told the jury, that the defendant was liable to the action, if "he or his servants have not taken the same care of the property as a prudent man would have taken of his own."

³ Brod. & Bing. 177.

And in *Riley v. Horne*,⁴ *Best*, Ch. J., says of a carrier: "The notice will protect him, unless the jury think that no prudent person, having the care of an important concern of his own, would have conducted himself with so much inattention or want of prudence." And the same learned judge in another case⁵ said: "They must take the same care of it that a prudent man does of his own property. This is the law with respect to all bailments for hire or reward." And *Denman*, Ch. J., said,⁶ "that there is no intelligible distinction between negligence and gross negligence." In *Wilson v. Brett*,⁷ Baron *Rolfe* said, he "could see no difference between negligence and gross negligence, that it was the same thing with a vituperative epithet." And in an important American case,⁸ the subject is reviewed with great learning and discrimination by one of the most competent and reliable of the American judges, and the attempted distribution of care and neglect into three precise and defined classes or measures, very clearly but moderately condemned or questioned. And the continental writers upon the civil law seem also to require perfect care and diligence as well as skill in all undertakings for reward where property is confided to the bailee. Thus *Domat*⁹ expresses the degree of care due from this class of bailees: "He who undertakes to keep cattle, ought to preserve that which is intrusted with all the care that is possible to be taken by persons who are the most watchful and diligent." And we submit, with deference and respect, that the most distinguished of the American writers,¹⁰ in attempting to maintain the old distinction of the three precise degrees of care and negligence, really gives an

⁴ 5 Bing. 217.

⁵ *Batson v. Donovan*, 4 B. & Ald. 32.

⁶ *Hinton v. Dibbin*, 2 Q. B. 646.

⁷ 11 M. & W. 113.

⁸ *Steamboat New World v. King*, 16 How. (U. S.) 474.

⁹ Part i., book i., tit. iv., sec. viii., art. iii.

¹⁰ *Story*, *Bailm.* § 11, *et seq.*

impression that a certain amount of negligence is justifiable in certain classes of bailments, which of course no such able and faithful commentator could intend.¹⁰ But he really does leave the impression that a much lower degree of faithfulness is required by ordinary care than that which is expressed either by the English judges or by Domat, as quoted above, and such a degree as could not fail to be unsatisfactory to careful men in any agent employed by them.¹¹

¹¹ In *Briggs v. Taylor*, 28 Vt. 180, 185, it is said: "Mr. Justice Story, Bailments, § 11, in order to maintain the old definition of three grades of diligence, defines it much in the manner it was done in the present case, 'Common or ordinary diligence which men in general exert in respect to their own concerns,' which certainly leaves upon the mind a different impression from the definition of Domat and the English judges, and we cannot but regard it as one calculated to mislead juries; and this very writer, in § 13, adopts the diligence of 'prudent men,' as the measure of common diligence; and it seems to us nothing short of this will do justice in a case like the present.

"It may with some plausibility be said, that one who employs a man known to the employer to be habitually indifferent to the management of his own concerns, has no right to expect him, all at once, even for reward, to assume a wholly different character, and the jury would be likely so to decide, the question being ordinarily one of fact, when the testimony raises any doubt; and when one employs a man of skill and talent in the management of his own affairs, he may justly expect him to exert the same skill and talent, to the same extent in the management of the business which he undertakes for others; and in the case of a public officer, who is selected for his fitness for the particular trust, every one may justly expect all the care and diligence, which men entirely competent and careful could reasonably be expected to exert in their own business of equal importance.

"The absurdity of this measure of duty in a public officer will become sufficiently obvious, if we advert to the form of the oath, or of the official bond of public officers. What should we think of having one sworn or giving bond to perform his duty as common men ordinarily do such things. This certainly sounds very different from the official oath, 'that you will faithfully execute the office to the best of your judgment and ability,' and an official bond obliges officers to the strictest, most faithful performance of all of their duties. Any other standard would sound absurd; and it is obvious to us, that the case of *Bridges v. Perry*, 14 Vt. 262, was not intended to impose any different rule of liability upon officers in keeping property. As said in *Drake on Att.* § 273: 'The officer must comply with all the requisitions of the law' (one of which is, to keep safely, property attached on mesne process, and restore it when required by law), 'or show some legal excuse for not doing so.' Hence in *Sewall v. Marston*, 9 Mass. 530, an officer was held bound to keep property attached on mesne process five years before, ready for sale on the execution. And in *Tyler v. Ulmer*, 12 Mass. 163, it

was held, an officer could not in such case excuse himself for not producing cattle, by showing that from the scarcity of fodder they could not have been kept alive.

"Any injury or loss, in such cases, renders the officer *primâ facie* liable, and imposes upon him the burden of showing some valid excuse. *Logan v. Matthews*, 6 Penn. St. 417; *Story on Bailm.* § 411; *Platt v. Hubbard*, 7 Conn. 501; *Burt v. Miller*, 13 Barb. 482. There is undoubtedly some contradiction in the cases, in regard to the burden of proof of negligence in the ordinary case of bailments for hire, but there can be no doubt, we think, in regard to the question in the present case. This is expressly so laid down in *Bridges v. Perry*. The court in that case, as will be obvious from a careful examination, had no purpose of excusing this class of officers from any degree of care and diligence, which careful men would expect under the circumstances.

"And this, it seems to us, is the true measure of liability in all cases of bailment. The bailee is bound to that degree of diligence, which the manner and the nature of his employment makes it reasonable to expect of him; anything less than this is culpable in him, and renders him liable. The conduct of men in general in the region where the attachment was made, may be some guide to what ought to be required of the defendant in keeping property attached. We mean of course, prudent and careful men, for no one is expected to go beyond the common custom of the country in such matters, as it must be attended with extraordinary expense, and a question might thereby arise as to the propriety of incurring such expense."

CHAPTER VII.

PAWN OR PLEDGE.

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| <p>§ 659. <i>The duty of the pledgee in keeping, use, and disposition of the things pledged.</i></p> <p>§ 660. <i>The pledgee may dispose of the pledge in payment of the debt at maturity.</i></p> <p>§ 661. <i>Not responsible for theft or robbery, unless he refuse to restore the goods after the bailment expires.</i></p> <p>§ 662. <i>What constitutes a mortgage of goods, and the equitable rights of the mortgagee after the law-day is passed.</i></p> <p>§ 663. <i>The proper distinction between a pledge and a mortgage.</i></p> <p>§ 664. <i>Pledgee may assign debt and pledge. No objection that he has other sufficient security.</i></p> <p>§ 665. <i>One may pledge future accessions of existing property.</i></p> <p>§ 666. <i>Pledge in security does not suspend right of action on debt.</i></p> | <p>§ 667. <i>The right of sale, in terms, not inconsistent with pledge.</i></p> <p>§ 668. <i>Possession must accompany the pledge, in order to its creation or continuance.</i></p> <p>§ 669. <i>The pledge of negotiable securities shuts out all equitable defenses.</i></p> <p>§ 670. <i>Coupon bonds pledged are not to be collected by the pledgee, but sold in the market. He may collect the interest coupons.</i></p> <p>§ 671. <i>Bond and mortgage secured on real estate may be pledged.</i></p> <p>§ 672. <i>Where an illegal debt is secured by pledge, the pledgor cannot recall the pledge without payment of the debt.</i></p> <p>§ 673. <i>Factors have no power to pledge the goods of their principals.</i></p> <p>§ 674. <i>The pledgee may assign the goods and the debt so as to transfer his interest.</i></p> |
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§ 659. A PAWN or pledge is where the debtor delivers any personal property to the creditor to be kept by him until the debt is paid, and upon the failure of the debtor to meet his obligation according to its terms, to dispose of the pledge in payment of the debt as far as it will go, and if anything remain after full payment to return it to debtor or pawner. Only a special property passes to the pledgee, the general property remaining in the pledgor. Any kind of personalty may be pledged, but more commonly the pledge consists of choses in action, and at the present day, of corporate or public stocks. (The pledgee is bound, at all events, to keep the thing safely until the debt ma-

tures, and where that is due presently, or upon demand, he must give the pledgor a reasonable time to redeem the thing pledged by payment of the debt, before he proceeds to convert it into money. And the creditor will not be justified in selling more of the things pledged than is requisite to raise the amount of the debt, unless where it is impracticable to make a division at that point without injury to the pledgor, in which case he must exercise a wise and prudent discretion. The pledgee is not ordinarily at liberty to use the pledge, and if he do so, and the thing is lost or damaged while in such use, the loss will fall upon the pledgee, otherwise the pledge will be at the risk of the pledgor, unless the pledgee have been guilty of culpable want of care and attention in keeping it. But it is said, that if the keeping of the thing is attended with any expense, the pledgee may put it to moderate use in order to meet that, as in the case of a horse. But we question how far any such implied right of use exists, even in this class of cases, unless there is some understanding between the parties to that effect.¹ But in the case of cows there

¹ In *Thompson v. Patrick*, 4 Watts, 414, it is said the pawnee may use the pawn, if it be not the worse for it, but is answerable for damages caused by the use. And in *Morey v. Conham*, Owen, 123, it was held, that if the pledge be of such a nature as to be a charge upon the pledgee, as a horse or cow, he may use it in a reasonable manner. He may ride the horse moderately, or milk the cow regularly, and must account toward the debt for any profit thus derived. 2 Wheeler's Am. Com. Law Rep. 136. Writers upon bailments have occupied considerable space in attempting to define the precise extent to which the pledgee may put the pledge to use. But this has been without reaching any very definite result. There can be no doubt it is not only the right but the duty of the pledgee to use the things sufficiently to preserve them in health, and the most perfect condition for valuable use. Cows must be milked, and horses so used as to be kept healthy and manageable. And beyond this, there may be cases where it is so manifestly for the advantage of both parties, that the things should be put to profitable use, that it may be fairly implied as the expectation of the parties, and so coming properly within their contract. And there will be other cases where use would be so detrimental to the pledge, that it must be presumed no such thing could have been intended. In the intermediate cases, it will be safe to conclude that no right to use the pledge exists, unless it was expressly stipulated or clearly implied.

could be no question of the right to milk them, and to use horses enough to preserve them in good condition. And in either case any profit derived from the use will go to diminish the expense of keep, or to extinguish the debt in case of excess. And where the debt is paid by the pledgor or by sale of a part or all the goods, it is the duty of the pledgee to return whatever remains in his hands belonging to the pledgor, and for any default in this respect or in keeping or disposing of the same, he will be responsible to an action and for compensation in damages.²

§ 660. These several points may be briefly illustrated by the decided cases. It seems questionable how far the holder of goods for a mere lien can sell them. But in one case,² *Gibbs*, Ch. J., said: "Undoubtedly as a general proposition, a right of lien gives no right to sell the goods; but where goods are deposited by way of security, to indemnify a party against a loan of money, it is more than a pledge. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade. These goods were deposited to secure a loan. It may be inferred, therefore, that the contract was this: 'If I the borrower repay the money, you must redeliver the goods; but if I fail to repay it, you may use the security I have left to repay yourself.' I think the defendant had a right to sell."

§ 661. So too if the property pledged be lost by robbery or theft, or in any other way, without the fault of the

² *Coggs v. Barnard*, 2 Ld. Rey. 909, 917; *Jones on Bailm.* 74, *et seq.*

³ *Pothonia v. Dawson*, Holt, N. P. C. 385. As to the right of the creditor to sell the pledge in payment of his debt, see *Brown v. Ward*, 3 Duer, 660; *Wheeler v. Newbould*, 5 id. 29; s. c., 16 N. Y. 392. It must be done at public auction and on notice to the debtor. *Washburn v. Pond*, 2 Allen, 474; *Davis v. Funk*, 39 Penn. St. 243; *Millikin v. Dehon*, 10 Bosw. 325. *Stevens v. Hurlburt Bank*, 31 Conn. 146; *Nelson v. Edmonds*, 40 Barb. 279. A doubt is suggested in *Martin v. Reid*, 11 C. B. (N. S.) 730, how far the pledgee can sell if no day is fixed for the payment of the debt. And it is clear that if there is any agreement between the parties as to the mode of sale of the pledge, it must be followed. *Stevens v. Bell*, 6 Mass. 339.

pledgee, he may still recover the debt.⁴ But if he lose it after the tender or payment of the debt and refusal to restore the goods, he is responsible, since by the refusal to restore the goods after his special property was determined, he was guilty of a conversion, and made the goods his own, at the election of the pledgee.⁵ In all cases where the goods are kept and refused to be returned, after the determination of the bailment, the bailee is liable in trover.⁶

⁴ *Manly v. Westbrooke*, Bull. N. Prius, 720 ; *Southcote's case*, 4 Co. 83.

⁵ *Ratcliffe v. Davies*, Yelv. 178.

⁶ *Bryant v. Wardell*, 2 Exch. 479; *Gifford v. Ford*, 5 Vt. 532. See also 1 *Powell on Mort.*, 3; *Bucknall v. Roiston*, Prec. Ch. 285; *Barrow v. Paxton*, 5 Johns. 261; *Holmes v. Crane*, 2 Pick. 607; *Brown v. Bennet*, 8 Johns. 96; *Marsh v. Lawrence*, 4 Cow. 481; *Jones v. Smith*, 2 Vesey, jr. 372, 378; 2 *Story, Eq. Jur.*, §§ 1030-1033.

Where goods pawned are incapable of delivery, the formal tradition from hand to hand is not required to create either a pledge or mortgage; as of logs in a boom, if shown to the pawnee, it is sufficient. *Jewett v. Warren*, 12 Mass. 300. Where no time is specified for redemption of a pledge, it may be redeemed at any time, even of the personal representative of the pledgee. *Caldyon v. Lansing*; 2 *Caines' Cas. in Error*, 200. But the pledgee will not acquire an absolute property by requiring the pledgor to redeem and his refusal of it. The pledgee cannot dispose of the pledge until he call on the pledgor to redeem, and if he cannot be found, judicial proceedings must be resorted to for the foreclosure of his title. *Garlick v. James*, 12 Johns. 146; *Hart v. Ten Eyck*, 2 Johns. Ch. 62. See *Bowman v. Wood*, 15 Mass. 534. The pledgor may maintain a bill in equity to redeem a pledge. *Hart v. Ten Eyck*, *supra*; or by tendering the amount due he may have trover. *Flowers v. Sprowle*, 2 Marsh. 56. The pledgee cannot be compelled to sell the property unless there is some such agreement. *Badlam v. Tucker*, 1 Pick. 389, 400. After the law-day is passed the mortgagor of goods cannot by tendering the debt maintain trover. *Brown v. Bement*, 8 Johns. 96; *Langdon v. Buel*, 9 Wend. 80; *Ackley v. Finch*, 7 Cow. 290; *Patchin v. Pierce*, 12 Wend. 61. And the mortgagee, omitting to take possession, will not defeat his title. *Hudson v. Warner*, 2 Har. & Gill, 415. The holder of choses in action as collateral security is a pledgee, and has no authority to compromise with the debtor. *Garlick v. James*, *supra*. The pawnee has no implied right to retain the pledge for other debts subsequently contracted. *Jarvis v. Rogers*, 15 Mass. 389. As to what constitutes a pawn, see *Jones v. Baldwin*, 12 Pick. 316; *Bank of Rochester v. Jones*, 4 Denio, 489; *Lucketts v. Townsend*, 3 Texas, 119; *Jarvis v. Rogers*, 13 Mass. 105; *Sumner v. Hamlet*, 12 Pick. 76. Where one makes a conditional purchase of goods, the property not to become his until payment of the price, and he receives the delivery, he will be regarded as a bailee, no property passing until payment of the price. *Sargent v. Gile*, 8 N. H. 325; *Clark v. Jack*, 7 Watts, 375. A pledge of personal property is not within the statutes of the several states requiring mortgages to be registered. *Doak v. Bank of the*

§ 662. There has been considerable discussion, in the books in regard to the proper distinction between a pledge and a mortgage of goods. The latter seems to be a pledge and something more, inasmuch as the general property in case of a mortgage passes to the mortgagee, and it may be valid, notwithstanding an agreement that the possession shall remain in the mortgagor until after the time fixed for redemption has passed, when the title of the mortgagee becomes absolute and the mortgagor has no redress except in a court of equity, where he may sometimes demand restitution on the ground of having lost his goods by way of forfeiture. But courts of equity will not ordinarily grant relief in such cases unless where the property is considerable and it has passed to the mortgagee for very inadequate consideration.⁷ It is not generally considered, that where the mortgagor of personalty understandingly stipulates that the general title to the goods shall pass immediately to the mortgagee, and he only retain a special property or right to redeem at a given time by the payment of a specified sum, and that in case of failure the property shall vest absolutely in the mortgagee in satisfaction of the debt, that there remains thereafter any further estate in the nature of an equity of redemption, as in the case of the mortgage of real estate. But as there is great opportunity for creditors, in this way, to gain an unconscionable advantage of needy and destitute persons, courts of equity will grant relief in cases of severity or hardship, on the ground of overreaching and virtual fraud, but not, as we understand

State, 6 Ired. 309. A loan of shares in a corporation amounts to a sale, since the same shares are not to be returned. *Dykers v. Allen*, 7 Hill, 497. But in a pledge of stock the same identical shares are to be restored. *Ib.* The taking a bill of sale of personal property at a price below its value, with an agreement to restore the property on repayment of the money with a small additional sum for trouble, for trying to sell the same, amounts only to a pledge, which is lost by surrendering possession to the general owner. *Kimball v. Hildreth*, 8 Allen, 167.

⁷ *Henry v. Tupper*, 29 Vt. 358, where the grounds of the interference of courts of equity in relieving from forfeitures is very extensively discussed, and the cases cited and commented upon more at length than we could here do.

the law, upon the ground of strict right to redeem in all cases of this character.

§ 663. The proper distinction between a pledge and a mortgage, the former being nothing more than the delivery of goods in security for a debt, and the latter embracing all the stipulations constituting the distinctive character of the contract, as stated in the next preceding section, is ably described, and the early cases analyzed, by *Baylies, J.*, in *Gifford v. Ford*.⁶

§ 664. There seems to be no question the pawnee may assign the pledge in connection with the assignment of the debt.⁸ But if the pledgee commingle the things pledged with his own, he must be responsible for all loss thereby.⁹ It is no objection to the validity of a pledge, that the creditor has other sufficient security for the payment of the debt. He is entitled to hold all his securities until the debt is paid.¹⁰

§ 665. Although the debtor cannot, strictly speaking, pledge property not in existence, he may stipulate that his creditor shall have a lien upon property thereafter to come into existence, as accessory to other property, real or personal then in existence, as bricks to be made upon a brickyard, in security for the rent or use of the same.¹¹ And the same rule applies to all cases of accessory increment, as the product of a farm to be held as security for the rent.¹² And a pledge to secure future advances is not invalid on that account.¹³

§ 666. A pledge in security of a debt does not suspend the right of action upon the debt, unless it be so stipu-

⁸ *Bullard v. Billings*, 2 Vt. 309; *Macomber v. Parker*, 14 Pick. 497; *Hunt v. Holton*, 13 Pick. 216; *Ferguson v. Union Furnace Co.*, 9 Wend. 345.

⁹ *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Nourse v. Prince*, 4 id. 490; 7 id. 69.

¹⁰ *Union Bank v. Laird*, 2 Wheat. 390; *Elder v. Rouse*, 15 Wend. 218.

¹¹ *Macomber v. Parker*, 14 Pick. 497.

¹² *Smith v. Atkins*, 18 Vt. 461. But at common law the rule seems to be uniform that the pledge of property thereafter to be acquired cannot be made. *Sminthurst v. Edmunds*, 1 McCarter, 408.

¹³ *Badlam v. Tucker*, 1 Pick. 398; *DeWolf v. Harris*, 4 Mason, 515; *Concord v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 448.

lated.¹⁴ The creditor may sue both the collaterals and the principal debt, at the same time, and is entitled to hold and pursue both until he secure payment.¹⁵ (But he is bound to pursue such a course with collaterals left in his hands as security, as to preserve all liens for the payment of the same, and if the debt is lost or deteriorated through his default the loss must fall on him.¹⁶)

§ 667. Where by the terms of the contract, where stock is deposited as collateral security for the debt of the de-

¹⁴ *Whitwell v. Brigham*, 19 Pick. 117; *Bank of Rutland v. Woodruff*, 34 Vt. 89.

¹⁵ *Comstock v. Smith*, 23 Maine, 202. And where personal chattels are pledged, the pledgee may sue his debt, in default of payment as stipulated, and attach the pledge. *Buck v. Ingersoll*, 11 Met. 226.

¹⁶ *Russell v. Hester*, 10 Alab. 535; *Knight v. Yarborough*, 7 S. & M. 179; *Foote v. Brown*, 2 McLean, 369. The pledgee is bound to take the same care of the pledge which a prudent person (*diligens pater-familias*) would take of his own. *Commercial Bank v. Martin*, 1 La. Ann. 344. But if it becomes necessary to employ an agent, on account of his particular profession and skill, the pledgee is not responsible for his conduct further than in making a judicious selection. *Ib.* But when the maker of a note pledged as collateral remained solvent for a considerable time after the debt fell due and the note is not accounted for, it will be presumed to have been paid or lost through the inattention of the pledgee, and he must account for the amount as payment toward the principal debt. *Reeves v. Smith*, 1 La. Ann. 379. But a delay to collect a collateral security for five months, there being no request by the pledgor to do so, and no reason to suspect the solvency of the debtor, will not render the pledgee responsible for the amount due, in case of the insolvency of the debtor. *Goodall v. Richardson*, 14 N. H. 567; *Smouse v. Bail*, 1 Grant, Cas. 397. As a general rule in such cases, the bailee is bound to use due diligence, and if collaterals prove unavailing through his default or delay, he will be held responsible to that extent. *Noland v. Clark*, 10 B. Mon. 239. See also *St. Losky v. Davidson*, 6 Cal. 643; *Slevin v. Morrow*, 4 Ind. 425; *Wakeman v. Gowdy*, 10 Bosw. 208; *Robinson v. Hurley*, 11 Iowa, 410; *Jennison v. Parkers*, 7 Mich. 355. The pledgee has no authority to settle the collaterals, by way of compromise, or accept new notes for the balance. *Depuy v. Clark*, 12 Ind. 427. Such a settlement will amount to a conversion, and the pledgor may sue for the amount without previous demand. *Ib.* The degree of diligence required of the pledgee in collecting collaterals, overdue at the time of pledge, must be determined as a question of law, there being no controversy in regard to the facts. *Wakeman v. Gowdy*, 10 Bosw. 208. And where the pledgees delayed three months to bring suit, and gave no notice to the pledgors, and in the mean time the debtors in the collaterals became insolvent, it was held culpable negligence. *s. p.*, *Roberts v. Thompson*, 14 Ohio (N. S.), 1; *Lamberton v. Windom*, 12 Minn. 232.

positor, authority is given to sell the same on the nonpayment of the debt, it was held a mortgage and not a pledge, and on default the title becomes absolute in the vendee.¹⁷ But this seems somewhat questionable, since it is of the essence of a mortgage of personal property, that it should be agreed that the general title pass at once to the mortgagee and become absolute on failure of payment. An authority to sell does not seem equivalent. And it is said in one case, that where the property is incapable of delivery and possession, as shares in a joint-stock company, a pledge may be created by a written transfer, and that it will not become a mortgage, even where the legal title passes to the creditor.¹⁸

§ 668. There seems to be no controversy that the transfer of possession of the thing pledged, to the pledgee, is indispensable to the creation of a valid pledge, and the continuance of such possession is equally indispensable to the continuance of the pledge.¹⁹

¹⁷ *Huntington v. Mather*, 2 Barb. (S. C.) 538. But see *Brownell v. Hawkins*, 4 Barb. S. C. 491, where a very similar contract is construed a pledge. So also in *Hasbrouk v. Vandervoort*, 4 Sandf. (S. C.) 74, a similar doctrine is declared. s. p., *Day v. Swift*, 48 Me. 368.

¹⁸ *Wilson v. Little*, 2 Comst. 443.

¹⁹ *Beeman v. Lawton*, 37 Me. 543; *Nevan v. Roup*, 8 Clark, 207; *Walker v. Staples*, 5 Allen, 34. It seems that in regard to the pledge of stock and other things incapable of manual tradition, there must be such delivery as the thing is capable of, in order to protect the property against subsequent assignments and levies. *Pinkerton v. Manchester, &c. Railw.* 42 N. H. 424. But if the property be present, and in the power of the pledgee at the time the contract is made, that will be sufficient without any formal handing over to the pledgee, if the property come into or remain in his actual custody. *Tibbets v. Flanders*, 18 N. H. 284. And if after so taking possession it will be sufficiently continued for the purpose of upholding the pledge that it is left on the premises of a third person. *Ib.* Where by the usages of any particular business, the delivery of the warehouse receipt, without endorsement, is accepted as a sufficient delivery, that is all that can be required. *Whitney v. Tibbits*, 17 Wisc. 359. Delivery to a third person for the benefit of the pledgee, will be sufficient. *Brown v. Warren*, 43 N. H. 430. And if the pledgee already have possession, that will be sufficient. *Ib.* In *Ward v. Sumner*, 5 Pick. 59, it is said a mortgage of chattels may be valid without actual possession in the mortgagee, but these are exceptions to the general rule, and stand on peculiar grounds. In all these cases the courts recognize the dis-

§ 669. The general title to collaterals which are of a negotiable character, when delivered to the creditor as security for a preëxisting debt, passes free from all equitable defenses on the part of the makers or others; and if such a delivery is had in a State where such a law exists, although in pursuance of a contract made in New York, where equitable defenses are allowed in such cases, the holder will take them free from all equities.²⁰

§ 670. Coupon bonds of a joint-stock corporation, when pledged as security for a debt are not to be regarded as choses in action to be collected by the creditor, but as property having a fixed market value to be sold by him upon the maturity of the debt, and on notice to the debtor and request of payment, as in other cases of the sale of property pledged.²¹ But the pledgee may collect the interest coupons as they fall due, and such act does not amount to any conversion.²²

§ 671. It is competent for the mortgagee of real property to pledge his interest in the same, together with the bond and mortgage, it being regarded merely as a chattel interest, and may be pledged the same as other choses in action. And if such security be assigned and delivered over to the payee of a promissory note, by the maker, with authority to sell the bond and mortgage upon default of payment by the assignor, the transaction will be regarded as a pledge, and not a mortgage or sale.²² The pledgee in such case acquires only the rights resulting from an ordinary

tinction between a mortgage and a pledge, that the former may be without possession, but the latter cannot. The mortgage of goods or securities, where the possession is agreed to remain in the mortgagor for a time, or for some particular purpose, commonly, until the debt matures, has been regarded as valid at common law, and approaches very nearly to the hypothecation of the Roman Civil Law, which also obtains in some departments of our own law, as in that of shipping. This species of mortgage is recognized as valid in *United States v. Hooe*, 3 Cranch, 73.

²⁰ *Culver v. Benedict*, 13 Gray, 7.

²¹ *Morris Canal, etc., Co. v. Lewis*, 1 Beasley, 323.

²² *Androscoggin Railw. v. Auburn Bank*, 48 Me. 335.

pledge, and cannot sell the pledge without demand of payment by the debtor.²³

§ 672. Where the debt for the security of which the goods are pledged, was illegal, having been contracted on Sunday, it was held the pledgor could not reclaim the pledge without making payment of the debt.²⁴

§ 673. The general rule of law, that a factor who has a lien upon the goods in his hands for the general balance due him from his principal, cannot pledge such goods to another, seems now perfectly well settled, both in England and in this country, notwithstanding considerable vacillation upon the subject at different periods.²⁵ And if the factor attempts to pawn the goods of his principal for his own debt, he is guilty of a wrong, and thereby dissolves his own lien, so that the owner may reclaim the goods without tendering or offering to pay the amount of the lien.²⁶

²³ *Campbell v. Parker*, 9 Bosw. 322. See also *Van Blarcom v. Broadway Bank*, id. 532.

²⁴ *King v. Green*, 6 Allen, 139.

²⁵ *Daubigny v. Duvall*, 5 T. R. 604; *Story, Bailm.* § 325; *Quiroz v. Trueman*; 3 B. & C. 342; *Jarvis v. Rogers*, 15 Mass. 389, by *Wilde, J.*

²⁶ *Wilde, J.*, in *Jarvis v. Rogers*, 15 Mass. 389. But the judges did not fully agree in regard to the precise effect of the factor attempting to pledge the goods of his principal. But the rule as stated in the text is most unquestionable, as laid down by Chancellor *Kent*, 2 Comm. 625: "Though a factor may sell and bind his principal, he cannot pledge the goods as a security for his own debt, not even though there be the formality of a bill of parcels, and a receipt. The principal may recover the goods of the pawnee; and his ignorance that the factor held the goods in the character of factor, is no excuse. The principal is not even obliged to tender to the pawnee the balance due from the principal to the factor; for the lien which the factor might have had for such purpose, is personal, and cannot be transferred by his tortious act, in pledging the goods for his own debt. Though the factor should barter the goods of the principal, yet no property passes by that act, any more than in the case of pledging them, and the owner may sue the innocent purchaser in trover. *Guerrein v. Peile*, 3 Barn. & Ald. 616; *Rodriguez v. Hefferman*, 5 Johns. Ch. 429. The doctrine, that a factor cannot pledge, is sustained so strictly, that it is admitted he cannot do it by indorsement and delivery of the bill of lading, any more than by delivery of the goods themselves. *Martin v. Coles*, 1 Maule & Selw. 140; *Shipley v. Kymes*, id. 484; *Grasasp v. Dyster*, 6 id. 1. To pledge the goods of the principal, is beyond the scope of the factor's power; and every attempt to do it under color of a sale is tortious

§ 674. But it seems to be unquestionable, that the pledgee, in ordinary cases, may assign or sell all his interest in the pledge, or he may pledge it to a stranger without invalidating his security. But he must assign or pledge it as and for a pledge, and not as being the absolute owner of the goods or securities. For if he assume to deal with the pledge as his own property, it is questionable whether he will not forfeit his own interest in it, and thus enable the general owner to reclaim it without paying the amount for which it had been validly pledged.²⁷ The later decisions seem to have settled the rule in this direction in regard to factors who attempt to pledge the goods of their principal, having no authority to do so.²⁸

and void." "So the factor may himself sell the goods he has already pledged. *Nowell v. Pratt*, 5 Cush. 111. *Contra*, *Bott v. McCoy*, 20 Ala. 578."

²⁷ *Whitaker v. Sumner*, 20 Pick. 399; *Story, Bailm.* § 324.

²⁸ *Hoffman v. Noble*, 6 Metc. 68, 74. *Shaw, Ch. J.*

CHAPTER VIII.

THE LETTING OF THINGS FOR HIRE.

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| <p>§ 675. <i>This species of bailment is divided into different classes. Enumeration.</i></p> <p>§ 676. <i>The bailee here impliedly stipulates for skill and diligence sufficient to accomplish the work in a reasonable time and proper manner.</i></p> <p>§ 677. <i>Definition of the requisites to constitute a bailment of hiring.</i></p> | <p>§ 678. <i>The hirer of things is bound to exercise watchfulness to keep them securely.</i></p> <p>§ 679. <i>The law will not presume negligence; but the admitted state of facts on the part of the bailee may demand explanation.</i></p> |
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§ 675. THIS species of bailment is subdivided into a considerable number of classes. The most simple form of it is where one lets personal chattels for use, for compensation. This, in the Roman Civil Law, was called *Locatio*, or *locatio-conductio rei*. The other classes are where the thing bailed is to have some work done upon it for compensation, as where a horse is to be shod, or a carriage repaired. This was called in the Roman law *locatio operis*. And this last is also subdivided into two classes: 1. Where the bailment is merely for having work done upon the thing bailed, and was called by the Roman law *locatio operis faciendi*. 2. Where goods are delivered to be carried from one place to another, called in the Roman law *locatio operis mercium vehendarum*. These several kinds of bailments except as they have been already considered, will be now briefly discussed. The degree of diligence required in these is the same as in all other bailments for hire, where no extraordinary diligence is required.

§ 676. It is not sufficient in this species of bailment, that the bailee conduct with entire good faith, and render

the same degree of care and diligence which he would in the conduct of his own business of equal importance. For here he undertakes that he is a man of such skill, care, and diligence, that he is fit and worthy to be intrusted with the business which he undertakes. The case may be fairly illustrated by that of shoeing a horse, or repairing a carriage. If the thing is undertaken gratuitously, and for the mere accommodation of the bailor in an emergency, as may sometimes be the case, the confidence is merely personal, and there is no assurance, and no just ground of expectation, except so far as it rests on personal knowledge and confidence, that the bailee is skilled in the matter he undertakes, or that he will exercise any particular degree of watchfulness in regard to the manner of doing the business. But on the other hand, where a stranger, for the first time, enters a workshop of any kind, and finds them prepared to undertake work of all kinds in their department, with the expectation of reasonable reward, there is an implied promise that the requisite skill is possessed by the workmen, and that all needed skill, care, and diligence will be applied to the work if undertaken, and anything short of this will be regarded equally a breach of contract and of duty. The work must be done in a reasonable time and proper manner.

§ 677. The leading incidents of this species of bailment are so well understood that it seems scarcely requisite to repeat them in detail. 1. The thing to be bailed must be of a personal quality. 2. It must be *in esse* and under the power and control of the bailor, either as his own property or else under his own dominion and control with the assent of the owner. 3. It must, of course, be a thing capable of being let. 4. There must be a price agreed between the parties, or at least it must be implied that a reasonable compensation is to be paid for the use, in some way. 5. There must be a delivery of the thing to the bailee for a particular time, or for some particular use,

and until that is accomplished. These propositions are so obvious and intelligible, as scarcely to justify devoting space, or time, to their illustration, as many writers have done. We shall therefore proceed, at once, to the consideration of the decided cases, which will sufficiently illustrate our meaning, in the several points of the above definitions where any is required.

§ 678. It is always the duty of a bailee for hire, to keep the things intrusted to him "safely and securely." There is in all such cases, an implied undertaking on the part of the bailee to exercise watchfulness, to keep the property from being lost or suffering harm, as where the plaintiff hired a cab to carry himself and luggage to his house, and on arrival the luggage was not found. It was held the implied undertaking resulting from the relation of the parties, justified the allegation in the declaration, that the defendant undertook to exercise due and reasonable care to keep the goods intrusted to him.¹

§ 679. It is often said in the cases and in the elementary books, that negligence in an ordinary bailee for hire is not to be presumed.² But that will depend altogether upon circumstances, and how far the facts admitted by the bailee, or shown by the state and condition of the thing bailed, naturally call for explanation. If the thing is not to be found when called for, this will naturally impose upon the bailee the duty of giving some explanation how it happened to disappear, and in connection therewith, ordinarily, how he kept it. But in cases of the mere deposit of goods, or where there is only a payment for

¹ *Ross v. Hill*, 2 C. B. 877; s. c., 10 Jur. 435.

² *Tobin v. Murison*, 9 Jur. 907. Thus in *Logan v. Mathews*, 6 Penn. St. 417, it is said that where the bailee for hire returns the property in a damaged condition and refuses at the time or subsequently to give any account how the injury occurred, the law will presume negligence on his part, and the burden will be upon him to show the absence of negligence. And it is the duty of the bailee for hire, where the thing is stolen, to show that he used due and proper care. *Brown v. Waterman*, 10 Cush. 117.

house room, and nothing for care and custody of the things bailed, the bailee is not responsible for the loss unless upon proof of some particular default or neglect,³ unless there is a total default in delivering up the goods on demand, and no explanation, or an evasive one, or one that is improbable.³

³ *Schmidt v. Blood*, 9 Wend. 271, per *Sutherland, J.*

CHAPTER IX.

SIMPLE CONTRACT OF HIRING, OR LOCATIO REI.

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| <p>§ 680. <i>The hirer stipulates for requisite skill and diligence to accomplish the purpose of the bailment prudently and safely.</i></p> <p>§ 681. <i>In hiring horses the hirer is bound to feed properly at his own expense, and treat the animals judiciously and prudently; unless where the owner retains control of the team by his driver.</i></p> <p>§ 682. <i>The hirer may allow his servants and others to use the thing, he being responsible for their conduct.</i></p> <p>§ 683. <i>The right of possession of the thing during the bailment is in the bailee.</i></p> | <p>§ 684. <i>The hirer not ordinarily responsible for the acts of the servants of the owner.</i></p> <p>§ 685. <i>The duties of the hirer as defined in the Roman Civil Law.</i></p> <p>§ 686. <i>The same rules obtain substantially in the American courts.</i></p> <p>§ 687. <i>If the thing fails to answer the purpose, hirer not bound to pay price.</i></p> <p>§ 688. <i>The same rule seems to have been applied to letting of the use of things for a term of time at a fixed price. The price is only due to the extent of the service.</i></p> |
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§ 680. THIS is where the thing is let for hire, either for a definite or an indefinite period. In such cases the bailee acquires a special property in the thing bailed, during the continuance of the bailment, and may by virtue thereof retain the thing even as against the bailor. In the leading case on this point it is said the bailee is "bound to take the utmost care, and to return the goods when the time of the hiring is expired."¹ And this is verified by an extract from Bracton,² where it is declared, that in this class of bailments, "where goods are let out for reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses." But it is here added, that the bailee will not be responsible if the thing bailed be stolen or taken by robbery without his fault, or, as is added in

¹ *Coggs v. Barnard*, 2 Ld. Ray. 909.

² Fol. 62 b.

another case,³ if the thing be destroyed by an accidental fire. And in *Finucane v. Small*,⁴ where a trunk containing goods was deposited with an upholsterer for a reward, the contents of which were stolen by his servants, notwithstanding he had put it, as he imagined, in a place of safe custody. He was holden not responsible, since he had taken as much care of them as of his own; and that positive evidence of negligence must be given to sustain such an action; and that proof that the bailee had had several things stolen before, and had been heard to complain of his servants, was not sufficient. But this seems to us not consistent with the general current of the decisions upon the subject, and with established principle. It is really defining the responsibility of a gratuitous bailee, as we have before seen. But where a watchmaker kept watches left for repair, in a less secure place than he kept his own, he was held clearly responsible if they were stolen by his own servants.⁵

§ 681. Most of the decided cases under this head turn upon points connected with the hire of horses, since that is a contract of very frequent occurrence, and in regard to which there are not uncommonly abuses. It has been held that in such cases the law implies that the hirer shall be at the expense and responsibility to see that the horse is properly fed.⁶ He is, no doubt, bound to see also that the horse is properly driven, and not overfed or allowed to drink at a time or in a manner detrimental to health, and

³ *Longman v. Gallini*, cited from 3 Chitt. Com. Law, 363; in 3 Petersdorff, Ab. 374.

⁴ 1 Esp. N. P. C. 314.

⁵ *Clark v. Earnshaw*, 1 Gow, 30.

⁶ *Handford v. Palmer*, 2 Br. & B. 359. There seems to have been considerable question, from time to time, in regard to the duty of making repairs during the letting. As a general thing, when things are hired for a particular occasion — and possibly the same rule will apply to hiring for a definite term, — the owner having the price of the use must meet any necessary expense incurred in keeping his property in fit condition for the use. It is clear that all repairs of a permanent character will thus fall upon the owner, and, as it seems to us, all repairs will naturally fall upon the owner, unless there is some contract, understanding, or usage to the contrary. Story, Bailm. §§ 388, 389.

if he is ignorant upon these matters, to make proper inquiries, or employ persons who do understand them to see to these particulars, and will be responsible for any ill consequences resulting from an omission in either particular.⁷ And if the animal, while under the bailment, becomes diseased, the bailee is bound to call a farrier, and will not, in that case, be responsible for any mistake the farrier may make in the treatment. But if, instead of doing this, he undertakes to prescribe himself, or allow others to do so, not being skilled therein, he will be responsible for all evil consequences.⁸ It seems to have been considered at one time, that where the owner of the team furnishes his own driver, the possession of the team is still in the owner, and that he might maintain trespass *vi et armis*, even against the hirer for any injury done to it by displacing the postillions or overdriving,⁹ etc. But we question very much, whether any such rule could now be maintained as to the hirer. But, as to third parties, the possession and responsibility for the team, in such cases, would probably be with the owner, unless the hirer did interfere with the management.

§ 682. There seems to have been some question made in the early cases, how far the hirer of a horse might allow his servants and others to use it during the bailment.¹⁰ This in regard to all things hired for use upon reward must depend very much upon the nature of the thing hired, the use for which it is hired, and the circumstances attending the contract, and to some extent upon the custom and usages attending similar transactions in the vicinity. In the last case cited a distinction was taken between the hire of a thing for a definite time and where it is only hired for a special occasion. But in general, we think it safe to affirm, that where the hirer of anything stipulates to

⁷ 3 Petersdorff, Ab. 375, 376, and note.

⁸ Dean v. Keat, 3 Camp. 4.

⁹ Dean v. Branthwaite, 5 Esp. 35; Samuel v. Wright, id. 263.

¹⁰ Bringloe v. Morrice, 1 Mod. 210; s. c., 3 Salk. 271.

retain it for a particular time, or for the performance of a particular business, he will be entitled to use it in the same manner he would his own, under the same circumstances, since he pays the price of the hiring for the purchase, as it were, of the property in the thing for the time or the occasion; and the fair and natural implication is that he will expect to use it as he uses his own. For instance, if a livery-stable keeper should hire a horse or carriage for six months, it would seem very absurd not to allow him to use it in his business. But where one hires a horse for his own driving, he would ordinarily be expected to use it in that mode. But in that case even, it would scarcely be expected that he should not allow his servants, or even strangers, to drive the animal on proper and necessary occasions. But this must be understood with this qualification, that the hirer will be responsible to the same extent for any misuse, by his servants or others, whom he allows to use the thing hired, as if done by himself.¹¹

§ 683. As we have before intimated, the bailee in this species of bailment is entitled, by virtue of his special property in the thing, to maintain the exclusive possession of the same, during the term or occasion for which it is hired, even as against the bailor.¹² And it is here said that if the bailee hires the horse for a certain time to go to a particular place, the owner cannot justify retaking the horse forcibly within the time, although the hirer go to a different place. If the bailee misuse the thing merely, that will not determine the special property, and the bailee's only remedy is by action upon the case. But if the thing be put to a different use, or sold, the bailment will be thereby determined, and if the bailor can quietly obtain possession of the same he may lawfully do so.¹³ But even in such case

¹¹ Story, Bailm. § 400.

¹² Lee v. Atkinson, Yelv. 172.

¹³ Swift v. Mosley, 10 Vt. 208; Wheelock v. Wheelwright, 5 Mass. 104; Homer v. Thwing, 3 Pick. 492; Rotch v. Hawes, 12 Pick. 136; Morse v. Crawford, 17 Vt. 499; Burton v. Curyea, 40 Ill. 320. The owner may maintain

he cannot justify a breach of the peace for that purpose.¹⁴ He must resort to his action at law.

§ 684. There has been, first and last, a good deal of controversy in the courts in regard to the responsibility of the hirer for the acts of the servants of the lender. And similar questions have arisen in regard to the responsibility of the owner of real property for the acts of the servants of a contractor to do work upon the same. It would be out of place here to go into that discussion at any considerable length. This will depend essentially upon the fact of the actual possession and control at the time the damage occurs, and whether the servant was acting under the orders of the owner, or the hirer; in short, whose servant he was, at the time, in doing the particular act.¹⁵

§ 685. The duty of the bailee in the case of hiring for use is succinctly stated by Domat:¹⁶ "The engagements of the person who takes anything to hire are, to put the thing to no other use than that for which it is hired; to use it well; to take care of it; to restore it at the time appointed; to pay the rent or hire; and in general he ought to observe whatever is prescribed by the covenant, by law, and by custom."¹⁷

replevin for the thing bailed after the bailment is determined by the bailee selling to a *bonâ fide* purchaser, during the continuance of the term. *Johnson v. Willey*, 46 N. H. 75. But it has been held that replevin will not lie for the mere detention of goods by a common carrier, when the same came lawfully into his possession. *Woodward v. Railway Company*, 46 N. H. 524. And the same rule has long existed in England. *Wilkinson v. King*, 2 Camp. 335.

¹⁴ *Dustin v. Cowdry*, 23 Vt. 631.

¹⁵ *Laugher v. Pointer*, 5 B. & C. 547. This whole subject is carefully examined in 1 Redf. Railw. 503, § 129; and the cases discussed at length. The case of *Blackwell v. Wiswall*, 24 Barb. 355, contains a very sensible exposition of the question by *Harris, J.* In *Hilliard v. Richardson*, 3 Gray, 349, there is a very elaborate and satisfactory opinion by *Thomas, J.* And the inquiry in all the cases is finally resolved into the question, Whose servant was the person at the time he did the act? Who could and should have controlled him? See also *Quarman v. Burnett* 6 M. & W. 499, for a full exposition of the points involved.

¹⁶ 1 Domat, 259, bk. 1, tit. iv. § ii. art. i.

¹⁷ L. 19, § 8, D. loc.; l. 10, l. 29, l. 34, c. eod.

§ 686. We shall find that these several propositions are substantially maintained in the decided cases, both English and American, to some of which we have already referred. Thus in *Solemer v. Fuller*,¹⁸ it is said the hirer is bound to use the thing with moderation, and not to apply it to any other use, or detain it for a longer period than that for which it was hired. He is bound to that degree of diligence in keeping the goods, which prudent men exercise in keeping their own goods, and to restore the article in as good condition as he received it, unless it be injured without his fault, by natural decay or external means.

§ 687. If the thing hired fails to answer the purpose for which it was hired, without the fault of the hirer, he will not be bound to make compensation for the use beyond what it was beneficial to him, as there is an implied undertaking on the part of the bailor in such cases, that the thing hired shall answer the purpose for which it is hired, and in case of failure the bailor is responsible for the failure to the extent of the price of the use in all cases, and in some cases even beyond that.¹⁹

§ 688. It would seem upon general principles, where property is hired for a term of time at a fixed price, as horses or oxen by the year, that the bailee in the absence of all express stipulations upon the subject must run the risk of the life and health of the animal so far as his own special property or ownership extends, and if the thing die or become unfit for use, without any inherent fault at the time of hiring, he cannot claim any deduction from the stipulated price. And this rule has been applied to the case

¹⁸ 1 So. Car. Const. Rep. 121; 2 Wheeler, Am. Com. Law, 139; *Millon v. Salisbury*, 13 Johns. 211; *Lockwood v. Bull*, 1 Cow. 322. The same rule applies to this species of bailment as to all others: that if the bailee put the thing to any other use than that for which it was hired, or keep it after the bailment has expired, he will be responsible for all losses which may happen, although without his fault, or even when they occur from inevitable accident. *Mayor of Columbus v. Howard*, 6 Ga. 213.

¹⁹ *Harrington v. Snyder*, 3 Barb. 380.

of a slave hired for the year, and who died at the beginning of the term.²⁰ But any custom or usage in regard to the subject will control, and there seems to be some kind of understanding among the dealers in this kind of bailment, that the hirer is only responsible for the price to the extent of the useful service performed, which makes the owner responsible, not only for the consequences of providential events, so far as his own property is concerned, but also as to the special property of the bailee.²⁰

²⁰ *Dickinson v. Cruise*, 1 Head, 258. But a different rule seems to have been applied in another case. *Griswold v. Taylor*, 1 Met. (Ky.) 228, where the hirer was only held responsible to the extent of the service performed. So also in *Wilkinson v. Morely*, 30 Alab. 562; *Birge v. Wanhope*, 21 Texas, 478. It would, therefore, seem that there is an implied condition in contracts of hire of this kind, that the hirer shall not be responsible for the price beyond the service performed, the same as in hiring for particular service.

CHAPTER X.

BAILMENTS FOR WORK OR CUSTODY, OR LOCATIO OPERIS ET
LOCATIO CUSTODIÆ.*

689. *This chapter will embrace bailments for work or repair, and also for safe custody.*
- § 690. *The bailee for work on compensation is responsible both for skill and diligence.*
- n. 1. *Summary of the cases on the point.*
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§ 689. THIS chapter may be subdivided into bailments for work or repair, strictly speaking, and which in the Roman law was denominated *locatio operis faciendi*, and

which embraces work performed upon the thing bailed, as by shoeing a horse or repairing a carriage; and also work performed in keeping the goods safely and preserving them from decay, rust, or deterioration in any other mode, called by the Roman law *locatio custodiae*; and on the other hand bailments for carriage, called in the Roman law *locatio operis mercium vehendarum*, of which we have already sufficiently spoken. In speaking of the former class of bailments, we will distinguish them into bailments for work and for custody, *locatio operis faciendi et locatio custodiae*.

§ 690. The rules of law are so precisely the same in regard to the duty of all ordinary bailees for hire, and so much has been already anticipated on this head, that we shall hope to be very brief. All mechanics and artisans, who undertake to do work and repairs in the line of their employment, naturally become responsible both for competent knowledge, skill, and experience; and also for the exercise of that diligence, care, and faithfulness, which is requisite to the successful accomplishment of the work. And where the result of the undertaking is not successful the laborer is not entitled to compensation, and he is also liable to an action for any injury to the materials furnished and with which he attempted to work.¹ As where the plaintiff's ship was in defendant's dry dock for repairs, and during a

¹ 1 Chitt. Pl. 96, 140. Thus in *Money Penny v. Hartland*, 1 Car. & P. 352, Lord *Tenterden* held, that a surveyor who undertook to furnish plans for building, and who, by reason of not making proper examination of the site and not resorting to proper tests as to the nature of the soil, furnished estimates which proved defective to a considerable extent, was not entitled to any compensation, and directed a nonsuit. And it is no excuse that he trusted to the investigations of a former surveyor of the same site. He does that at his own risk, it being his duty to make the investigations himself. 2 C. & P. 378, by *Best*, Ch. J. And the same rule of responsibility applies to all persons who, for hire, undertake the work of another in any matter requiring special knowledge or skill, as in the case of an attorney. *Russell v. Palmer*, 2 Wilson, 325. So, too, a surgeon, who undertakes cases in the line of his profession, is responsible for the requisite degree of skill for the treatment of the case understandingly, and care and diligence in proportion to the emergency, and for default in either particular will be responsible in damages. *Sheare v. Prentice*, 8 East, 348.

remarkably high tide the water burst open the gates, and the vessel, being driven against another, was greatly damaged.² The workmen, with the exception of one watchman, were away, although the accident happened in the daytime. It was submitted that this showed a less degree of care in regard to plaintiff's ship than the defendant might have been supposed to take of his own property, and Lord *Ellenborough* concurred in the argument, and the plaintiff had a verdict. A similar rule as before stated has been applied to the case of a watchmaker, who took a chronometer to repair and allowed it to be kept so carelessly that it was stolen.³ But if the employer presume to control the judgment of the bailee and require the work to be done under his own direction he cannot recover for any ill consequences, and must make full compensation for all services, however little benefit result therefrom.⁴

§ 691. The general property of the thing bailed remains in the bailor, and if during the course of the work it is destroyed by fire or otherwise, without the fault of the bailee, the loss will fall upon the bailor, and he will also be liable to the bailee for the work already accomplished.⁵ But this responsibility may be controlled by the special contract of the parties or by the usages and customs of the trade or business; and the general practice of the country in regard to any particular class of bailments is often of weight in determining what are the fair and natural implications resulting from the terms used in making the bailment, or from the relation of the parties.⁶ But where the workman undertakes to perform a prescribed piece of work, and is himself to furnish the materials also, it is rather a case of sale than of bailment; and as no title passes to the purchaser until the thing is completed, it will remain at the

² *Leck v. Maestaer*, 1 Camp. 138. See also *Duncan v. Blundell*, 3 Starkie, 6.

³ *Clark v. Earnshaw*, 1 Gow, 30.

⁴ *Duncan v. Blundell*, 3 Starkie, 6.

⁵ 2 Kent, Comm. 590; *Gillett v. Mawman*, 1 Taunt. 137; *Menetone v. Athawes*, 3 Burr. 1592.

⁶ *Gillett v. Mawman*, 1 Taunt. 137.

risk of the workman, and if lost or destroyed by any contingency, before it is completed and ready for delivery, the loss will fall exclusively upon him, notwithstanding he was doing the work under special directions to manufacture a particular thing according to a specific pattern.⁷

§ 692. It seems scarcely requisite to allude to a considerably numerous class of cases, where the bailment really amounts to a sale, or what the Roman civil law writers called *mutuum*, as where the thing delivered is not expected to be returned in specie, but in a manufactured article, according to an established rate of compensation ; as where grain is delivered, to be paid for in flour, a barrel for a given number of bushels. And the same thing exists in the manufacture of wool or yarn into cloth, or potatoes into starch, where all the material is thrown into one mass, and the former owners paid out of the manufactured article, after a particular rate. In all these cases the material, after delivery, is entirely at the risk of the bailee, and he can recover nothing for any work done until he is ready to deliver the manufactured article, unless as the result of some special undertaking, or custom, or usage.⁸ In such cases, ordinarily, the bailor, as we call him for convenience, parts with the title to his goods, on delivery, and in lieu thereof acquires the obligation of the other party, not to restore the same thing, but its agreed value in other articles of the same or a different kind and quality. Of course in these cases, the bailee cannot maintain trover for the default of the other party to compensate him in the articles promised, although some courts, without much regard to principle, have upheld the action of trover in such cases.⁹

⁷ Story, Bailm. § 427 a.

⁸ *Pierce v. Schenk*, 3 Hill, 28 ; *Buffum v. Merry*, 3 Mason, 478 ; *Barker v. Roberts*, 8 Greenl. 101 ; *Hurd v. West*, 7 Cow. 752 ; *Chase v. Washburn*, 1 Ohio, (N. S.) 244. And it is here said that if wheat is bailed to one to keep safely and return on demand, the bailee has no right to mix the same with other similar wheat, and if he do so, without the knowledge or consent of the bailor, it amounts to a conversion.

⁹ *Erwin v. Clark*, 13 Mich. 10. This was the case of a grain elevator, where

§ 693. In general, bailees of goods for hire, have a lien upon them for any work done, or materials furnished in the repair. The early cases on the point will be found carefully collected by Mr. Justice *Metcalf*, in his edition of *Yelverton*.¹⁰ But there are some exceptions to the general rule. The agisters of cattle have no lien upon the cattle unless there is some contract or understanding to that effect.¹¹ And the same rule obtains in regard to livery-stable keepers.¹² But there is one qualification of the lien in this class of cases, which does not obtain in the case of innkeepers, as we have seen. For here the lien will not attach unless the goods are left by the owner, or by his consent.¹³

§ 694. Very nice and difficult questions sometimes arise in regard to the right of the bailee for hire to recover, either in whole or in part, where the service has failed either in being performed in time, or according to the precise terms of the contract. The early cases upon this point were extremely stringent and inflexible, in requiring strict performance in all cases, as a condition precedent to any right of recovery. But the relaxations and meliorations of modern times have reached a more equitable and rational rule upon the subject. If the bailor derive any real benefit from the work, and there was no willful departure from the contract on the part of the bailee, he may recover so much as the work has proved worth to the bailor, that is, deducting from the usual or contract price,

all grain of the same kind is thrown into one mass, and the owners accept a check for the amount delivered by them on demand.

¹⁰ *Yelverton*, 67 and note.

¹¹ *Chapman v. Allen*, Cro. Car. 271; *Goodrich v. Willard*, 7 Gray, 183; *Grinnell v. Cook*, 3 Hill, 485.

¹² *Yorke v. Greenough*, 2 Ld. Raym. 866; *Jackson v. Cummins*, 5 M. & W. 350, 351; *Parsons v. Gingell*, 4 C. B. 545. But a trainer of horses, it has been held, may have a lien for his services. *Bevan v. Waters*, 3 C. & P. 520; *Forth v. Simpson*, 13 Q. B. 680. But mere livery-stable keepers have none. *Miller v. Marston*, 35 Me. 154.

¹³ *Hollingsworth v. Dow*, 19 Pick. 228.

all damages resulting to the bailor from not having the work done either in the time or manner stipulated.¹⁴ But where the contract makes full and perfect performance a condition precedent, there can be no recovery short of that.¹⁵

§ 695. The bailee for work for reward will not be entitled to use materials superior to those stipulated, with any view to higher compensation, unless there is evidence of the previous or subsequent assent of the bailor.¹⁶ Nor will the bailee be allowed to charge extra compensation for extra work, unless the deviation was previously or subsequently sanctioned by the bailee. But in this latter case he may recover upon the original contract, as far as it can be followed, and for the deviations either under the terms of the contract allowing them, or upon a general assumpsit, in *quantum meruit* form. And the fact that the original contract was under seal, will not preclude a recovery in assumpsit for the work done under the stipulations allowing a deviation.¹⁷

§ 696. We shall now briefly consider the remaining class of bailees under this head, bailments for custody, for reward, or deposits for hire, *locatio custodiae*. This class of bailments embraces agisters of cattle and livery-stable keepers, warehousemen and wharfingers, as well as forwarding merchants, and factors or bailiffs.

§ 697. In regard to agisters of cattle and livery-stable keepers, they are responsible to the same extent as other bailees for hire, that is, to exercise the same care and watchfulness for the safety of the cattle or horses intrusted

¹⁴ *Basten v. Butter*, 7 East. 479; *Grant v. Button*, 14 Johns. 377; *Booth v. Tyson*, 15 Vt. 515; *Sinclair v. Bowles*, 9 Barn. & C. 92; *Faxon v. Mansfield*, 2 Mass. 147; *Myrick v. Slason*, 19 Vt. 121; *Duncan v. Blundell*, 3 Starkie, 6; *Farnsworth v. Garrard*, 1 Camp. 39; *Fisher v. Samuda*, id. 190.

¹⁵ *Steamboat Co. v. Wilkins*, 8 Vt. 54; *Brown v. Kimball*, 12 id. 617.

¹⁶ *Burn v. Miller*, 4 Taunt. 745, 749.

¹⁷ *Sherwin v. Rut. & Bur. Railw. Co.*, 24 Vt. 347; *Lawrence v. Dole*, 11 Vt. 549; *Little v. Holland*, 3 T. R. 590; *Myrick v. Slason*, 19 Vt. 121.

to them, that prudent men would be expected to do in regard to their own property, under the like circumstances. If, therefore, the pasture or stable is unsafe for the animals by reason of pitfalls or otherwise, or not properly fenced, or the gates or doors are left open or the fence down, by reason of which the cattle or horses escape, or are injured by other cattle coming into the pasture or otherwise, the bailees will be responsible for the injury.¹⁸

§ 698. Warehousemen include also wharfingers who keep warehouses upon the wharves or landing places, for the accommodation of transportation by water. Wharfingers also usually perform the duty of lightermen in lading and unlading goods transported by vessels upon the water. Forwarding merchants embrace a considerable class of persons in this country, who act as middlemen and forwarders of goods, at intermediate points along our extended lines of transportation, either by land or water. These men are commonly also warehousemen, and not uncommonly wharfingers. The duty of all these several classes of persons, in their respective lines of employment, in regard to skill, faithfulness, and care, is much the same. They are bound to have proper accommodations for the amount and kind of business which they profess to do, and which will be likely to arise at the particular point. They should also be careful to employ only competent and trustworthy agents and servants, and either themselves, or through competent representatives, exercise a constant and judicious supervision of the business, so as to secure its accomplishment, in due time, and with proper exemption from loss or damage. And if there is any failure in

¹⁸ *Broadwater v. Blot*, Holt, N. P. C. 547. In regard to compensation to bailees, for hire, that, in common with other kinds of business, will depend upon the usual prices for such services in the place at that time and upon the implied understanding of the parties, which will naturally be controlling. *Southern Steamship Co. v. Sparks*, 22 Texas, 657. The agister of cattle can only be held responsible for their loss upon proof of negligence on his part. *Rey v. Toney*, 24 Mo. 600.

consequence of defect in any of these particulars or any other, the warehousemen, wharfingers, or forwarding merchants will be responsible.

§ 699. Thus it seems to be settled that a warehouseman, in any of the forms above stated, is not responsible for the loss of the goods, by an accidental fire, without his fault.¹⁹ But if the warehouseman remove the goods to another warehouse from that where the owner deposits them, and for which he agreed to pay rent, it might impose an additional responsibility.¹⁹ But the point was not fully decided here. But where there is any omission to take the ordinary and accustomed precautions in keeping the goods safe from fire or theft, or any other danger, there can be no question the warehouseman will be held responsible.²⁰ It is here stated that if the goods are lost by fire or the ingress of thieves, the bailee is *prima facie* responsible, and must prove that he exercised due care. But the general course of the decisions seems to show that it is incumbent upon the bailor to show some evidence of negligence in such cases, in the first instance, before he can call upon the bailee to go into his own exculpation.²¹ But undoubtedly where the bailee declines to produce the goods, or to give any explanation how they have disappeared, he will be held responsible for them.²⁰ But where the nature and cause of the loss appear, unless there is upon the face of the transaction something to require explanation on the

¹⁹ *Abbott, J.*, in *Sidaways v. Todd*, 2 Stark. 400. He is only responsible for ordinary diligence. *Bliss v. Mayo*, 10 Vt. 56. The point of what amounts to a delivery to a warehouse man is here discussed.

²⁰ *Platt v. Hibbard*, 7 Cowen, 497.

²¹ *Harris v. Packwood*, 3 Taunt. 264; *Marsh v. Horne*, 5 B. & C. 322. In *Lichtenhein v. Boston & Providence Railw.*, 11 Cush. 70, it was held that a warehouseman who fails to deliver property bailed to him, is bound to show that the loss occurred without the want of ordinary care or diligence on his part, but not necessarily the precise mode in which the loss occurred. But in *McDaniels v. Robinson*, 26 Vt. 316, it was said that any such attempted explanation will be essentially defective and unsatisfactory, unless it point to some probable mode of explanation of the loss. See also *Bush v. Miller*, 13 Barb. 481.

part of the bailee, he will not be held responsible unless the bailor give some proof of default of duty.²¹ The test of the duty of a warehouseman is well defined in *Platt v. Hibbard*,²⁰ by *Walworth*, circuit judge, in his charge to the jury, that they were to "inquire whether a prudent man, owning the property in question, would, with a full knowledge of all the facts, have intrusted it in the storehouse as this was left." It seems certain that mere warehousemen are not responsible for goods stolen or taken by robbery or burglary or in any other mode from without, by strangers, unless in fault themselves, either by improperly exposing the goods, or not taking proper precautions, or in some other way. And it is said they are not responsible where the goods are stolen by their own servants.

§ 700. But as we have before said, we do not regard this as entirely consistent with the general rule of responsibility of masters for the acts of their servants, in the course of the employment. There can be no question if the servant destroys or injures the goods, or secretes them where they cannot be found, the master must, on general principles, be held responsible for the act of the servant, since his act is that of the master. But since the master cannot be held criminally responsible for the act of the servant, the felony, not being the act of the master, seems to have been considered, by some mysterious process of absorption, to have merged all the agency of the master through the servant in regard to the goods, from the first taking, and thus to have completely severed the agency, and with it the responsibility of the master. We expect, confidently, that some day, by the thorough handling of some master of the law, this thin disguise will be stripped off, and the master, although he clearly cannot be made a felon, by the act of his servant in the course of his employment, will be made to stand responsible, *civilliter*, for all the acts of his servant in the course of his employment. Here as in other cases *respondeat superior*.

§ 701. There seems to be no question that upon general principles, and in conformity with general usages, warehousemen of all classes have a lien upon the goods in their custody for all expenses incurred in regard to the particular goods, but not for a general balance of account, unless by special contract or understanding, or by virtue of some usage or local custom, known to the parties, and therefore presumably adopted as part of their contract.²²

§ 702. We have before explained, in connection with the law of carriers, the connection between them and the different classes of warehousemen, and at what particular points the responsibility of the one terminates and that of the other attaches, to which we must refer the reader as embracing the most important points of the law affecting the duty and responsibility of these different classes of bailees.²³

§ 703. If a warehouseman insure the goods in his own name, he may in case of loss, as before stated, recover the whole amount of the loss, and will hold the amount above his own charges in trust for the general owner.²⁴

§ 704. A warehouseman is bound to look after the goods and see that they do not suffer from dampness or other exposure.²⁵ But the cases all agree that he is only responsible for such neglect as a prudent man would not be expected to suffer in regard to his own property of equal value.²⁶

§ 705. In regard to factors, bailiffs, and commission merchants, they are bound to that degree of knowledge, skill, and diligence which will enable them to transact the matters intrusted to them, in such a manner as to secure safety and reasonable benefit and profit to the owner. In general

²² *Steinman v. Wilkins*, 7 Watts & S. 466; *Low v. Martin*, 18 Ill. 286.

²³ *Ante*, pt. ii., chs. ix., x., xxi.

²⁴ *Waters v. Monarch Life & Fire Ins. Co.*, 34 Eng. L. & Eq. 116.

²⁵ *Brown v. Hitchcock*, 28 Vt. 452; *Cox v. O'Riley*, 4 Ind. 368.

²⁶ *Neal v. Wilmington Railw.*, 8 Jones, Law, 482; *McCullum v. Porter*, 17 La. Ann. 89; *Dimmick v. Milwaukie, etc. Railw.*, 18 Wisc. 471.

a factor is bound to conform to the usages and customs of trade, in regard to giving credits on sales, making insurance, and all other incidents of the business. But it must be understood that any special instructions of the principal must be strictly followed²⁷ unless in some extreme emergencies where the factor may act his own discretion, where an exigency has arisen to render it very certain that such would be the wish of the principal if he could be consulted. But as the existence of telegraphic communication now enables the factor commonly to take the instructions of the principal, on the occurrence of any unexpected emergency, it will be his duty to do so; and thus the occasions, for deviating from his instructions upon his own responsibility, will be very infrequent.

§ 706. Factors and all commission merchants have a lien upon the goods and also upon the papers of their principals for all advances and expenses incurred in regard to the particular consignment or transaction, and in general by special contract or understanding for any general balance due them on account of all the dealings between the parties.²⁸

§ 707. In the case of all bailees for custody, it is their duty to exercise watchfulness in regard to redelivery of the goods to the bailee or some one authorized by him to receive the same on his behalf. And where the bailee delivered goods to a wrong person upon a forged order, he was held responsible in trover, as for a conversion.²⁹

²⁷ *Streeter v. Horlock*, 1 Bing. 34.

²⁸ *Yelverton*, 679, and *Metcalf's note*. *Zinck v. Walker*, 2 W. Black. 1154; *Drinkwater v. Goodwin*, Cowp. 251; *Kinlock v. Craig*, 3 T. R. 119.

²⁹ *Lubbock v. Inglis*, 1 Starkie, 104; *Willard v. Bridge*, 4 Barb. (S. C.) 361.

CHAPTER XI.

THE REMEDIES ALLOWED AT LAW IN REGARD TO BAILMENTS BOTH AS TO THE PARTIES TO THE CONTRACT AND STRANGERS.

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| <p>§ 708. <i>Only an outline of the principles here given.</i></p> <p>§ 709. <i>The bailee may always maintain an action for any injury to the thing by a stranger.</i></p> <p>§ 710. <i>The bailor may also sue in trespass and trover in all such cases, unless he has parted with the right of possession, when he can only bring case.</i></p> <p>§ 711. <i>In that case the bailee may have tres-</i></p> | <p><i>pass or trover against all who injure the property, even the bailor.</i></p> <p>§ 712. <i>The bailor may sue the bailee in assumpsit or case, or if he so pervert the use as to determine the bailment in trespass or trover.</i></p> <p>§ 713. <i>The bailee cannot in general dispute the title of the bailor. Some exceptions stated.</i></p> <p>§ 713. <i>The bailee not generally liable to action unless made after demand, etc.</i></p> |
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§ 708. WE have already occupied so much space upon this general subject and have incidentally given so many intimations in the course of the discussion of other points, in regard to the appropriate remedies, that we shall do little more than to give a brief outline of the recognized principles upon this topic.

§ 709. It may be assumed as a universal rule, that for any injury to the thing bailed, while in the actual use and keeping of the bailee, he may maintain the action and may recover the full damages even to the value of the property, and will hold the same in trust for the general owner. And it will make no difference that the bailee is a mere depositary, since the wrongdoer is not allowed to defeat the action by showing that the general owner had a larger interest in the thing. Bare possession of personal property is sufficient title against all the world, except the real owner.¹

¹ *Waterman v. Robinson*, 5 Mass. 303. And a recovery by the bailee will bar

§ 710. It is also true that in all these cases the bailor might maintain the action, unless he had parted with the right of possession to the bailee for a definite time or purpose, so that he would have had no right to reclaim the same at the time the injury occurred, in which case he could not at the common law have maintained either trespass or trover against the wrongdoer, but must have resorted to an action upon the case for the special injury to his reversionary interest.²

§ 711. In the class of cases last named the bailee might bring trespass or trover against the wrongdoer, and recover to the full extent of the injury, even the value of the property. And in this class of cases, where the bailee has the exclusive right to the possession of the thing bailed, at the time the injury occurs, he may maintain an action not only against strangers for any injury done by them, but he may also have an action of trespass or trover against the bailor for any unauthorized interference with his exclusive right to the use of the thing.³

§ 712. As against the bailee for any default of duty in not keeping the thing bailed, or not safely returning it to the bailor, he may bring assumpsit, counting upon the breach of contract implied from the undertaking, or he may have an action upon the case, sounding in tort, and counting upon the breach of duty resulting from the relation.⁴ And where the bailee sells the thing, or otherwise puts it to a use entirely outside of the purposes of the bailment, he thereby determines the relation, and renders himself responsible in trespass or trover, the same as if the bailment had never existed,⁵ and the bailor may have his

any action by the bailor. *Chesley v. St. Clair*, 1 N. H. 189; *Bissell v. Huntington*, 2 id. 142; *Bliss v. Shaub*, 48 Barb. 339.

² *Thorp v. Burling*, 11 Johns. 285; *Bronnel v. Manchester*, 1 Pick. 232; *Emmerson v. Fisk*, 6 Greenl. 200.

³ *Hickok v. Buck*, 22 Vt. 149.

⁴ 1 Chitty on Pleading, 96, 140.

⁵ *Cooper v. Willomatt*, 1 C. B., 672; *Bryant v. Wardell*, 2 Exch. 479; *Wilkinson v. King*, 2 Camp. 335.

action and this he may do not only against the bailee, but even a *bonâ fide* purchaser.⁵ It seems to be well settled, that the bailee cannot dispute the title of the bailor, by showing title in a third person, unless such third person have given the bailee notice not to deal with the bailor, and that he will hold him responsible for the thing,⁶ in which case it might be the duty of the bailee, if sued by the bailor, to bring the parties before a court of equity by bill of interpleader.

§ 713. The bailee is not liable to an action for not delivering the thing, as a general rule, until after demand and refusal, unless he has done some act amounting to a conversion or determination of the bailment.⁷

⁶ *Butler v. Kenner*, 14 Martin, 274. But if the goods are taken from him by act of law as the property of another, he may show it in defense. *Burton v. Wilkinson*, 18 Vt. 186. Or if the bailee is made a party to the suit and is by the court decreed to transfer the property to a receiver, this will be a sufficient protection. *Webb v. Thornton*, 45 Barb. 390. And in a somewhat late English case, *Thorne v. Tilbury*, 3 H. & N. 534, it is said that it seems the warehouseman is not estopped to dispute the title of the bailor; but that if the goods are the property of another he may refuse to deliver them, if he do so relying upon the title of that other, but this must be done by his consent and authority.

⁷ *Brown v. Hotchkiss*, 9 Wend. 361; *Hallenback v. Fish*, 8 id. 547; *Packard v. Gitman*, 4 id. 613.



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Date Due

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